

Crime as Punishment:
A Legal Perspective on Vigilantism in South Africa

by Mary Nel

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Supervisor: Prof Gerhard Kemp

Co-Supervisor: Prof Lars Buur

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DECLARATION

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MARY NEL

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ABSTRACT

This study aims to remedy a gap in legal literature by addressing the phenomenon of vigilantism from a legal perspective, and seeking to conceptualise and understand the problem.

To this end, it first arrives at a working definition of vigilantism for a legal context by critically analysing previous (non-legal) efforts to define vigilantism and identifying and discussing elements of a proposed crime of vigilantism. The focus then shifts to interrogating the relationship between (the erosion of) state legitimacy and vigilante self-help. After demonstrating the usefulness of the concept of legitimacy as an overarching framework for understanding the state-vigilante relationship, three dimensions of legitimacy (legal, normative and demonstrative) are explained and the assumed nexus between (deficient) state legitimacy and vigilantism is clarified. Next, factors precipitating state delegitimation in the criminal justice context are identified so as better to grasp the role of deficient state legitimacy in fostering vigilantism – and concomitantly, how the state might remedy such shortcomings. While it is argued that state delegitimation is by no means the only factor contributing to the emergence and prevalence of vigilantism, a common thread running through many vigilante narratives is that the failure of criminal justice agents to do their job properly opens a law-and-order gap that vigilantes are only too willing to fill with their own brand of “justice”. To appreciate the role played by vigilantes as informal criminal justice “providers”, vigilante counter-legitimation strategies and rituals are then explored. They are compared to those utilised by their formal counterparts, with the aim of better delineating the common ground (or lack thereof) between state-sanctioned criminal justice and vigilantism. Thereafter, various divergent state responses to vigilantism are outlined and critically evaluated, divided into chapters focusing on state re-legitimation strategies premised on exclusion (e.g., criminal prosecution) and inclusion (e.g., restorative justice). The emphasis throughout is on how to address vigilantism in such a way as to balance a non-negotiable respect for human rights with the need to respond to pressing community order and security concerns. It is concluded that

vigilantes may indeed be willing to abandon violent means of problem-solving sufficiently to legitimate – and work in partnership with – a formal criminal justice system committed to addressing issues of crime and disorder in a community-responsive, inclusive, respectful and restorative manner.

ABSTRAK

Die oogmerk van hierdie studie is om die leemte wat tans in regsliteratuur bestaan te remedieer deur die verskynsel van vigilantisme (“vigilantism”) te konseptualiseer, begryp en aan te spreek vanuit ’n regspektief.

Ten einde die bogenoemde oogmerk te bereik, word daar eerstens ’n bruikbare definisie van vigilantisme in die regs konteks afgelei deur die kritiese analise van voormalige (nie-wetlike) pogings om vigilantisme te definieer. Verder word die elemente van die voorgestelde misdaad van vigilantisme identifiseer en bespreek. Daarna verskuif die fokus na ’n ondersoek van die verhouding tussen die (verbrokkeling van) staat legitimiteit en vigilantisme. Nadat die nuttigheid van die legitimiteitskonsep as ’n oorkoepelende raamwerk vir die begrip van die staat-vigilante verhouding gedemonstreer is, word drie vlakke van legitimiteit (wetlik, normatief en demonstratief), bespreek en die aangenome nexus tussen die (onvoldoende) staat legitimiteit en vigilantisme word verduidelik. Volgende word die faktore wat lei na die ontkenning van staat legitimiteit in die konteks van die (straf)regspiegling identifiseer, ten einde die rol van onvoldoende staatslegitimiteit in die bevordering van vigilantisme te begryp. Daar word ook gefokus op hoe die staat hierdie tekortkominge kan regstel. Daar word aangevoer dat alhoewel die ontkenning van die staat se legitimiteit nie die enigste bydraende faktor tot die ontstaan en algemeenheid van vigilantisme is nie, daar ’n duidelike en algemene denkpatoon onder vigilantes heers dat die gebrek aan ’n doeltreffende strafregstelsel ’n gaping in die reg skep. Vigilantes is al te gereedlik bereid om hierdie gaping met hulle eie vorm van geregtigheid aan te vul. Ten einde die rol van vigilantes as informele kriminele geregtigheid “verskaffers” beter te verstaan, word die teen-legitimasie strategieë en rituele van vigilantes ondersoek. Hierdie strategieë en rituele word dan vergelyk met dié wat deur formele eweknieë aangewend word, met die oog op die uitbeelding van ’n gemeenskaplike basis (of die afwesigheid daarvan), tussen straf wat goedgekeur is deur die staat en vigilantisme. Hierna word verskeie uiteenlopende antwoorde op vigilantisme uitgelê en krities geëvalueer. Dit

word verdeel in hoofstukke wat fokus op strategieë vir die herlegitimasie van die staat, beide gebaseer op uitsluiting (bv. strafvervolging) en insluiting (bv. herstellende geregtigheid). Daar word deurgaans gefokus op hoe om vigilantisme aan te spreek op so 'n wyse dat daar 'n balans getref word tussen 'n nie-onderhandelbare respek vir menseregte en die behoefte om antwoord te bied op die dringende orde en sekuriteit bekommernisse onder die gemeenskap. Die gevolgtrekking wat gebied word, is dat vigilantes wel bereid sal wees om gewelddadige vorms van probleemoplossing te staak, mits 'n legitieme, saamwerkende en formele regsplegingstelsel, toebetrou tot die oplossing van misdaad en wanorde in 'n gemeenskapsbetrokke, inklusiewe, respektvolle en regstellende wyse, geskep kan word.

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1 CHAPTER ONE: INTRODUCTION

“Necklacing is a cry for help from Etwatwa

2015-09-20

At the height of the struggle against apartheid, many people were killed in what was termed necklacing – putting a tyre around a person’s neck and setting it alight.

Most of those who suffered this fate were accused of being *impimpis* (snitches) for betraying comrades to the apartheid government. It is a painful past that the country does not want to remember or revisit.

However, the reports this week from Etwatwa in Springs, Ekurhuleni, of four young men being set alight by angry community members have refocused the attention on those dark days of our history. One of the victims escaped death – the others were not so lucky.

Similar acts have been reported throughout the country recently. The actions of the Etwatwa residents tell an important side of the story.

We do not condone any acts of necklacing, barbaric attacks on others or vigilantism. But according to the community of Etwatwa, members of the Overloaded (OVL) gang, which the four youngsters belonged to, were terrorising residents to such an extent that some were afraid of going to work, while pupils could not walk to school. Residents say OVL started as a group that targeted nyaope-smoking youths in the community – until it transformed into a gang stealing from residents and terrorising them. Police remained oblivious to their predicament, so the residents decided to take the law into their own hands.

These acts of lawlessness in communities would not be allowed, or even considered by residents, if police were doing their jobs – by being visible at all times and arresting criminals.

When the police service fails to do its duty, it leaves room for communities to pursue vigilante justice, regardless of whether their victims are provably guilty.”

– F Haffajee, *City Press* editorial (2015-09-20).

1 1 Filling the gap

The subject of this study is vigilantism.¹ The concept of people “taking the law into their own hands”,² or resorting to “self-help”³ or “mob justice”,⁴ is a familiar part of the lexicon of anyone who reads South African newspapers regularly. Surprisingly, despite its ubiquity, vigilantism has largely been overlooked as a topic of legal research, and if dealt with,⁵ engagement has taken the form of condemnation. Its legal neglect is unfortunate and inexplicable, since the fundamental issues of law, order, justice and power that lie at the heart of vigilante activities have a myriad of significant legal implications. As will be shown, vigilantes who take the law into their own hands to punish deviance seemingly exemplify an instance where “law” and “order” are detached from each other for practical reasons, with vigilantes choosing order over law.⁶ Their attitude to the law appears to be that its real-world application does not necessarily serve the ideal of justice it purports to embody.⁷ In addition, vigilantes’ ambiguous positioning “in the interstices between state and society, law and disorder, legitimacy and illegitimacy”⁸ points to the ongoing and dynamic interaction between state⁹ and popular

¹ Defining vigilantism is the topic of chapter 2. It may provisionally be understood as the unlawful and intentional use of force by private citizens to punish someone who is the perpetrator of real or perceived forms of deviance. It is aimed (at least in part) at offering guarantees of collective security and social order in circumstances where there is a real or perceived absence of effective formal guarantees of order and security.

² Newsroom “Delft Residents Taking Law Into Their Own Hands” (2015-09-10) *91.3FM The Voice of the Cape* <<http://www.vocfm.co.za/delft-residents-taking-law-into-their-own-hands/>> (2015-10-21).

³ Editorial “Zero Tolerance For Mob Justice” (2014-06-14) *DispatchLive* <<http://www.dispatchlive.co.za/opinion/editorial-zero-tolerance-for-mob-justice/>> (2015-10-21), where vigilantism is termed a “horrific form of ‘self-help’”.

⁴ News “We’re Going to Burn These Thieves” (2015-08-19) *IOL* <<http://beta.iol.co.za/news/crime-courts/were-going-to-burn-these-thieves-1902503>> (2015-10-21). This article also has a link to a disturbing video of mob justice being meted out in Snake Park, Soweto.

⁵ For instance, in case law where acts of vigilantism are prosecuted.

⁶ E Stettner “Vigilantism and Political Theory” in H J Rosenbaum and P C Sederberg (eds) *Vigilante Politics* (1976) 65.

⁷ R G Abrahams *Vigilant Citizens: Vigilantism and the State* (1998) 154.

⁸ D Pratten “Introduction The Politics of Protection: Perspectives on Vigilantism in Nigeria” (2008) 78 (1) *Africa* 13.

⁹ It is recognised that it might be more technically accurate to use the term “government” instead of “state” when referring to the governmental institutions wherein state power lies and through which state power is wielded. Although where the focus is the “internal relationship between a society and its governing coercive organization”, the two terms are often used interchangeably or equated (see the sources quoted in E Heath Robinson “The Distinction Between State and Government” (2013) 7/8 *Geography Compass* 556–558), theoretically they are distinct. Heath Robinson (2013) *Geography Compass* 556 distinguishes them on the basis that “[s]tates are nonphysical juridical entities of the international legal system, whereas governments are organizations with certain coercive powers. The relationship between a government and its state is one of representation and

justice whereby vigilantes “find themselves enmeshed in zones of contestation around the legitimate exercise of authority”.¹⁰ It is submitted that these considerations, as well as its wider societal and political repercussions, make vigilantism a fascinating and fertile topic for legal research.

Just as vigilantes perceive themselves to be “filling the gap” left by unsatisfactory law-enforcement,¹¹ this study aims to fill a gap in legal research by remedying the law’s failure to engage properly with vigilantism. The central question of this research is:

How may the phenomenon of vigilantism be conceptualised, understood and addressed from a legal perspective?

In order to answer this question, vigilantism is analysed within the theoretical framework of legitimacy so as to determine the nature of the relationship between (deficient) state legitimacy and vigilantism. More specifically, three main aspects are considered:

- (1) What factors may contribute to such state delegitimation from a vigilante perspective – i.e., what is the relationship between the erosion of state legitimacy and vigilante self-help?
- (2) What techniques do vigilantes employ to legitimate their actions to themselves and others, such as the wider community and the state?

authorized agency.” According to C Flint & P Taylor *Political Geography: World-Economy, Nation-State and Locality* (2007) 137, “government can be interpreted as the major agent of the state and exists to carry out the day-to-day business of the state. Governments are short-term mechanisms for administering the long-term purposes of the state.” The term “state” is preferred for present purposes, firstly, because as it suggests an exercise of power more abstract, more permanent than “government”, it avoids the undesirable overtones of party politics, and recognises that although a particular government may fall, the state itself continues to exist. Secondly, using the term “state” rather than “government” is in line with Weber’s traditional conception that an essential characteristic of the modern state is its claim to monopolise the use of force, and that “the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it” (M Weber *Economy and Society: An Outline of Interpretive Sociology* (1968) 56). Whether the state may indeed claim a monopoly on the legitimate use of coercion is an issue that is central to this study – and is a claim that, as will become clear, is hotly contested by vigilantes.

¹⁰ Pratten (2008) *Africa* 5.

¹¹ See B Harris *As for Violent Crime That’s Our Daily Bread: Vigilante Violence During South Africa’s Period of Transition* (2001) 27, who notes that vigilantism’s existence may be explained as a way of filling the “policing gap” left by failing authorities.

- (3) How may the state best counter vigilantes' self-legitimation strategies and relegate itself – i.e., what is the most effective way to respond to vigilantism so as to harness (or neutralise) vigilante power? Inherent in relegitimation is a focus on solutions that are forward-looking, involve reintegration rather than simply condemnation, and uphold and advance constitutional values.

1 2 Setting the scene

Before elaborating on this study's aims, objectives and methodology, some of the main themes running through this research will be highlighted briefly. The City Press editorial quoted above¹² sets the scene for a preliminary reflection on vigilantism: What are its origins? What are its essential nature and defining characteristics? And what is its connection with other sources of punitive power, particularly those originating from the state?

1 2 1 A historical perspective

A first aspect alluded to in the editorial is that in South Africa the term "vigilantism" has not always had its present-day primarily crime-fighting connotations. In the African townships of the 1950's, "vigilance associations" were mechanisms for dispute settlement that strongly emphasised traditional values, being anti-urban, anti-youth and strongly disciplinarian.¹³ During the 1970s there was a revival of extra-state, mass-based vigilantism and dispute settlement in the form of the *lekgotla*,¹⁴ which drew on a similarly conservative moral code espousing traditional authority structures and patriarchy. *Makgotlas* denounced the harsh punishment techniques¹⁵ of the "vigilance

¹² F Haffajee "Necklacing is a Cry for Help From Etwatwa" (2015-09-20) *News24* <<http://www.news24.com/Opinions/Necklacing-is-a-cry-for-help-from-Etwatwa-20150918>> (2015-10-12).

¹³ J Seekings "Social Ordering and Control in the African Townships of South Africa: An Historical Overview of Extra-State Initiatives from the 1940s to the 1990s" in W Schärf and D Nina (eds) *The Other Law: Non-State Ordering in South Africa* (2001) 76.

¹⁴ Plural: *makgotla*.

¹⁵ Such as thrashing disrespectful youth with a sjambok (whip).

associations” as being barbaric, preferring to focus on pre-emptive solutions to violent crime with the aim of restoring community harmony.¹⁶ The township revolts of 1984-1986 brought new forms of extra-state justice into existence, namely “People’s Courts”. Unlike the *makgotlas*’ emphasis on restoring a romanticised pre-colonial past, the efforts of People’s Courts were directed towards promoting the political project of advancing liberation and “people’s power” and were broadly aligned, organisationally and ideologically, with those radically opposed to the apartheid state.¹⁷ People’s Courts increasingly used violent and summary means – “necklacing”¹⁸ was a typical killing method – to quash *impimpis* (those deemed to be in league with the apartheid authorities). From the mid-1980s the term “vigilante” was a pejorative label reserved for the violent, reactionary and state-supported groups that attempted to impose a more conservative and “traditional” order by crushing those – including the young “comrades” active in the People’s Courts – who challenged apartheid’s socio-political *status quo*.¹⁹ Certain renegade ANC-initiated self-defence unit (“SDU”) members – *comtsotsis* – of the 1980s and early 1990s who acted against criminals rather than *impimpis*, or who used violence for personal gain instead of to advance political objectives, are also

¹⁶ Seekings “Social Ordering and Control in the African Townships of South Africa: An Historical Overview of Extra-State Initiatives from the 1940s to the 1990s” in *The Other Law: Non-State Ordering in South Africa* 81-85.

¹⁷ 89-92.

¹⁸ “Necklacing” entails placing a petrol-filled tyre around the victim’s neck and setting it alight. The ensuing death is particularly painful, being caused not only by the burns, but also by asphyxiation either by the fumes released by the burning rubber or the sudden extraction of the oxygen around the tyre as it starts to burn (A Minnaar “The New Vigilantism in Post-April 1994 South Africa: Crime Prevention or an Expression of Lawlessness?” (2001) (May 2001) *Institute for Human Rights and Criminal Justice Studies* 1 48).

¹⁹ See N Haysom *Mabangalala: The Rise of Right-Wing Vigilantes in South Africa (Occasional Paper 10)* (1986); N Haysom (1989) “Vigilantes: A Contemporary Form of Repression”; Seekings “Social Ordering and Control in the African Townships of South Africa: An Historical Overview of Extra-State Initiatives from the 1940s to the 1990s” in *The Other Law: Non-State Ordering in South Africa* 93; D Bruce & J Komane “Taxis, cops and vigilantes: Police attitudes towards street justice” (1999) 17 *Crime and Conflict* 39; Harris *As for Violent Crime That’s Our Daily Bread* 7-11; and S J Cooper-Knock & O Owen “Between Vigilantism and Bureaucracy: Improving Our Understanding of Police Work in Nigeria and South Africa” (2015) 19 (3) *Theoretical Criminology* 355 n 31. Examples of conservative vigilante squads operating in various South African townships were the A-Team, Ama-Afrika, Pakatis, Mabangalala, Amadoda, Witdoeke, Amasolomzi, Amabutho, Mbhokhoto and the Green Berets.

sometimes retrospectively classified as vigilantes, and their activities are distinguished from those of the “real” SDU comrades.²⁰

Post-1994, vigilantism’s right-wing and politically-inspired connotations made way for the current conception of vigilantism as a response to crime and disorder rather than a means to get rid of political opponents. While there are aspects of contemporary vigilantism that resonate with its pre-1994 forms – most notably vigilantes’ penchant for brutal methods of punishment, vigilantism’s tendency towards conservatism, and its populist mandate – the dynamics and motivations of vigilante violence in South Africa today are not the same as those of pre-1994 vigilantism. Although an exploration of vigilantism cannot overlook its historical roots and their continued effect on its modern-day manifestations, aspects of which will be considered in later chapters, the present focus is primarily on vigilantism in the more recent crime-fighting sense, and not on its historical forms.

1 2 2 Crime or Punishment?

A second theme of the study is a feature of vigilantism vividly illustrated by the editorial, namely the way in which vigilantism exemplifies the insight that the ostensibly clear boundary between crime and punishment is often blurred and arbitrary. This is because of the twofold “displacement of culpability”²¹ inherent in vigilantism. On the one hand, vigilantes view themselves as the purveyors of “morally sanctimonious violence”²² that needs to be meted out to evildoers in the absence of suitable formal remedies. On the other, the formal criminal law perspective on vigilantism obstinately ignores the underlying causes of vigilantism, with the state in the main preferring simply to blame vigilantes for acting violently and to punish them for taking the law into their own hands.

²⁰ See Bruce & Komane (1999) *Crime and Conflict*; Harris *As for Violent Crime That’s Our Daily Bread* 11-14.

²¹ N Sundar “Vigilantism, Culpability and Moral Dilemmas” (2010) 30 (1) *Critique of Anthropology* 113 114.

²² W Burrows *Vigilante!* (1976) xv.

Vigilantes thus occupy “an awkward borderland between law and illegality”, paradoxically breaking the law in order to respect it.²³ The uncertain and contested nature of the distinction between deviance and responses to deviance, including vigilantes’ ambiguous status as both victim and perpetrator, is an important theme of this research – and one with significant legal implications. While there have in recent years been a growing number of attempts by criminologists, sociologists and anthropologists to describe and account for specific manifestations of vigilantism in various parts of the world,²⁴ as mentioned above²⁵ vigilantism is a topic that has received little or no legal attention. Typically, the formal legal system unequivocally condemns violent vigilante acts out of hand.²⁶ While this reflexive response is understandable in the light of the brutal “justice” often meted out by vigilantes, as will be elaborated in § 2 4 2, it is submitted that it would be preferable to arrive at a more reflective and nuanced evaluation of vigilante behaviour that recognises vigilantes’ status as both the wronged and the wrongdoers.

1 2 3 A slippery phenomenon

A third theme of the present research is the equivocal nature of vigilantism, clearly evident in the City Press excerpt: The OVL gang members necklaced for terrorising the community started out as vigilantes themselves, targeting *nyaope*-smoking youths. The power of the vigilante group to

²³ Abrahams *Vigilant Citizens* 7, 153.

²⁴ See, e.g., T G Kirsch & T Grätz *Domesticating Vigilantism in Africa* (2010); D Pratten & A Sen *Global Vigilantes: Perspectives on Justice and Violence* (2007); Abrahams *Vigilant Citizens*; M K Huggins *Vigilantism and the State in Modern Latin America: Essays on Extralegal Violence* (1991); H J Rosenbaum & P C Sederberg *Vigilante Politics* (1976); W Schärf & D Nina *The Other Law: Non-State Ordering in South Africa* (2001); D Nina *Re-Thinking Popular Justice: Self-Regulation and Civil Society in South Africa* (1995); B Baker *Taking the Law Into Their Own Hands: Lawless Law Enforcers in Africa* (2002); D Feenan *Informal Criminal Justice* (2003); C Knox & R Monaghan *Informal Justice in Divided Societies: Northern Ireland and South Africa* (2002) and L Johnston “What is Vigilantism?” (1996) 36 *British Journal of Criminology* 220.

²⁵ At § 1 1.

²⁶ See, e.g., *Jansen and others v S* [2008] JOL 22398 (C) at 2, where Brusser AJ stated: “The concept of vigilantism is absolutely antithetical to the concept of the due process of the law and, as such, cannot be condoned.” See also Hoffman AJ in *S v Schrich* 2004 1 SACR 360 (C) at 370, who refers to the “serious threat which vigilante action poses to the very fabric of society as we know it.”

transform itself – in the case of the OVL, from protecting to threatening the community – points to an aspect related to vigilantism that is important for this research, namely that it is in essence “ephemeral, volatile, and quick to change”.²⁷ A large proportion of vigilante acts are carried out by spontaneous groups that do not endure beyond the length of time it takes to mete out punishment, and even the vigilante groups that are more organised tend to teeter precariously in the no-man’s-land between “pure” criminality and incorporation into some form of state-sanctioned crime-fighting initiative.²⁸ One of the motivations for undertaking this research is to evaluate the feasibility of state efforts that encourage vigilantes to become legitimate criminal justice partners, including whether such incorporation might reverse the tendency of vigilante groups to degenerate into delinquency.

Needless to say, vigilantes’ mutability and impermanence also makes generalising about vigilantism very challenging, since its multifaceted nature makes definitive and straightforward demarcations unfeasible. Achieving conceptual clarity requires resorting to a theoretical delineation of vigilantism’s “ideal type” characteristics, with the elements identified being at best a rough approximation of any particular real act of vigilantism.²⁹ However, the advantage of engaging in theorising about vigilantism in general terms rather than focusing exclusively on specific vigilante incidents is that the insights offered may be applicable in a range of practical contexts.

1 2 4 The role of legitimacy: the state-vigilante relationship

A last noteworthy vigilantism-related theme mentioned in the editorial is that vigilantism is in many instances something that occurs in response to (in)action by the state. Rightly or wrongly, vigilantes view the state as not having fulfilled its positive obligation to protect citizens from all forms of

²⁷ J A Bidaguren & D Nina “Governability and Forms of Popular Justice in the New South Africa and Mozambique: Community Courts and Vigilantism” (2004) 1-2 (31) *Social Justice* 165 178.

²⁸ See § 7 3 2 for more on the challenges of vigilante incorporation.

²⁹ See § 2 3 for more on “ideal types” in the vigilante context.

violence,³⁰ and they respond by appropriating to themselves certain responsibilities and powers of the formal criminal justice system to punish deviants. The state-vigilante relationship is a core preoccupation of this study.

As will become apparent, vigilante groups operate at the intersection of state and society³¹ – “twilight institutions”³² that “challenge the authority of the state from within and from outside, using its own language of authority, and at the same time draw on, if not directly mimic, its procedural and symbolic forms of legitimacy”.³³ By in effect co-opting an aspect of state power – punishment – that is (ideally) the exclusive preserve of the criminal justice system, vigilantes themselves exercise a form of public authority that requires legitimation.³⁴ Hansen and Stepputat argue that sovereignty is not a *de iure* quality given to those in power, but is rather “a tentative and always emergent form of authority grounded in violence that is performed and designed to generate loyalty, fear, and legitimacy from the neighborhood to the summit of the state.”³⁵ The implication is that “public authority – or ‘stateness’ – can wax and wane”,³⁶ meaning any claims by the state (or other actors such as vigilantes) to wield legitimate force are just that – assertions that are contested and may be challenged.³⁷ From this perspective, the existence of vigilante groups is a stark reminder of the precarious foundation of state legitimacy, and the state’s need to “perform” its sovereignty continuously and convincingly by justifying its exercise of power in practice, or risk being fatally undermined.

³⁰ Constitution of the Republic of South Africa, 1996 s 12(1)(c). See also J Malan “The Inalienable Right to Take the Law Into Our Own Hands and the Faltering State” (2007) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 642.

³¹ D J Smith *A Culture of Corruption: Everyday Deception and Popular Discontent in Nigeria* (2007) 167.

³² C Lund “Twilight Institutions: An Introduction” (2006) 37 (4) *Development and Change* 673; C Lund “Twilight Institutions: Public Authority and Local Politics in Africa” (2006) 37 (4) *Development and Change* 685.

³³ L Buur “Reordering Society: Vigilantism and Expressions of Sovereignty in Port Elizabeth’s Townships” (2006) 37 (4) *Development and Change* 735 at 750.

³⁴ Lund (2006) *Development and Change* 673; 678.

³⁵ T B Hansen & F Stepputat “Sovereignty Revisited” (2006) 35 (1) *Annual Review of Anthropology* 295 297.

³⁶ Lund (2006) *Development and Change* 686.

³⁷ L Buur “Domesticating Sovereigns: The Changing Nature of Vigilante Groups in South Africa” in T G Kirsch and T Grätz (eds) *Domesticating Vigilantism in Africa* (2010).

This study uses the concept of legitimacy as an overarching framework for understanding the complex and dynamic relationship between state and citizen in the criminal justice sphere, as well as the nature of the threat posed to state sovereignty by vigilantism. Beetham's³⁸ definition of legitimacy as the rightfulness of power, focusing not on belief in legitimacy as such, but on whether feeling obliged to obey is justifiable on normative grounds³⁹ is the point of departure for an analysis of the relationship between vigilantism and the state in this study. Three cumulative and complementary aspects of legitimacy required for the justified exercise of power are identified, which may be termed legal legitimacy, normative legitimacy and demonstrative legitimacy respectively.⁴⁰

As will be argued in chapter 3, vigilantism does not necessarily undermine the state's legal legitimacy (rule-derived validity) by rejecting (or more commonly challenging) the idea of a state or political order *per se*. Although their conduct has the potential for subversion, vigilantes are essentially a "conservative mob"⁴¹ who seldom desire to institute completely new laws and moralities. Rather, they seek to supplement the criminal justice system in circumstances where they perceive the state to have failed to provide satisfactory assurances of collective security and social order. Thus vigilantism is an intrinsically relational concept, with the decision to resort to vigilantism often actually presupposing the existence of the state. It is therefore simplistic to view the categories of "state" and "vigilante" as two completely discrete and separate domains that are in opposition to one another.⁴² As noted by Kirsch and Grätz, vigilante violence may instead be a specific way of executing state power, with vigilante crime-fighting discourses and actions being a "precarious analogue" to those of state agencies.⁴³

³⁸ D Beetham *The Legitimation of Power* (2013).

³⁹ "Normative" compliance is used in this study to denote an internal moral obligation to obey owing to a belief in the rightfulness of the authority in question, as opposed to compliance due to fear or external coercion. For more on the moral obligation to obey, see xiii and § 3 2 1 below.

⁴⁰ These labels are my own, not Beetham's.

⁴¹ Abrahams *Vigilant Citizens* 4.

⁴² Buur "Domesticating Sovereigns" in *Domesticating Vigilantism in Africa* 28.

⁴³ T G Kirsch & T Grätz "Vigilantism, State Ontologies & Encompassment: An Introductory Essay" in T G Kirsch and T Grätz (eds) *Domesticating Vigilantism in Africa* (2010) 10.

In respect of Beetham's second legitimacy component, normative legitimacy, it is argued that vigilantes do indeed dispute whether the state's power is justified in terms of shared beliefs and values. In the context of the state-citizen power relationship, one of the fundamental justifications for the state's existence is its purported ability to ensure the physical security of its citizens. In Hobbesian terms,⁴⁴ the vigilante perceives the state as having violated the "social contract" whereby all citizens renounce their natural right to self-protection on condition that the sovereign safeguards these rights on their behalf. Where the state fails to discharge these responsibilities, state claims to wield a monopoly of legitimate force lose moral authority, and each citizen's dormant right to self-help revives until such time as the state is factually able to assume its protective duties.⁴⁵ This aspect of legitimacy may help explain why vigilantes believe that their violent conduct is a justified response to the state's inability to serve its fundamental function of dealing effectively with threats to order and social stability.⁴⁶

A third dimension of legitimacy is legitimacy through expressed consent,⁴⁷ or demonstrative legitimacy. Where a system of power such as the state cannot enforce respect for its rules or becomes chronically unable to justify itself in terms of shared beliefs – in other words, if it is unable to effectively "perform its sovereignty" – the negative aspects of power relations, which may have become obscured and redefined by the legitimization process, "are starkly exposed, and experienced for what they are".⁴⁸ The disillusionment that accompanies eroded legitimacy exacerbates citizens' resentment and frustration, and may result in them being less inclined to actively and willingly co-operate with those in power. Vigilantes' temporary usurpation of state power to fill the policing vacuum left by the state's seeming inability to preserve a satisfactory level of social order and collective security

⁴⁴ See § 3.5.2.2 below for more.

⁴⁵ Malan (2007) *Tydskrif vir die Suid-Afrikaanse Reg* 346-351; see also U Yanay "Co-opting Vigilantism: Government Response to Community Action for Personal Safety" (1993) 13 (4) *Journal of Public Policy* 381 at 383.

⁴⁶ C Shearing "The Relation Between Public and Private Policing" (1992) 15 *Crime and Justice* 399.

⁴⁷ See Beetham *Legitimation of Power* 12, who refers to "evidence of consent expressed through actions".

⁴⁸ D Beetham *The Legitimation of Power* (1991) 109.

may be characterised as a potent demonstration of significant state delegitimation.

This study hopes to show that the underlying dynamic of (state) legitimacy erosion and delegitimation followed by (vigilante) counter-legitimation is a very useful explanatory framework for understanding the dynamic involved in vigilante violence.

1 3 Aims and objectives

Taking into account the above context and the need to conceptualise, understand and address vigilantism from a legal perspective, this study has several aims:

A key preliminary objective is to argue for the separate criminalisation of vigilantism, including identifying and explaining the elements of such a new crime, and in so doing arrive at a workable definition of vigilantism that may be employed in a legal context. At present, a form of collective liability is often employed in cases of mob killings, whereby it is possible to hold all participants liable for murder regardless of whether they causally contributed to the victim's death.⁴⁹ Rather than simply tarring all co-perpetrators with the same (bloody) brush, it is proposed that vigilantism be distinguished from other forms of violence by making it a separate crime with its own requirements for liability and legal consequences. Utilising such a crime of vigilantism in practice would allow for "fair labelling"⁵⁰ of vigilantes and for the tailoring of vigilante-specific punishment options that acknowledge the underlying motivations for vigilante violence.

An important second goal is to ascertain the relationship between the emergence of vigilantism and state legitimacy – i.e., to explore the extent to which vigilantism is a product of weak or eroded state legitimacy. By

⁴⁹ See § 6 3 2 2 for more on the workings and iniquities of the common purpose doctrine.

⁵⁰ See A Ashworth *Principles of Criminal Law* (2006) 88 and J Chalmers & F Leverick "Fair Labelling in Criminal Law" (2008) 71 (2) *Modern Law Review* 217; also § 2 7 below.

pinpointing and categorising aspects of state performance that may make people and communities more vigilante-prone, it is hoped that this may facilitate state agencies' efforts to deal more effectively with vigilantism.

A third aim is to determine how vigilantes are able to position themselves as a viable criminal justice alternative: what self-legitimation techniques do vigilantes employ to convince others to choose their method of violent justice in the competitive "multi-choice policing"⁵¹ context of South Africa today, where the maintenance of communal order, security and peace appears to be anything but a state-monopolised commodity? Addressing this question of vigilante counter-legitimation also entails identifying the overlaps and contrasts between formal criminal justice enforcement methods and vigilantism, as well as differentiating vigilantism from other non-state policing options lawfully available to citizens.

The last and perhaps most significant objective is to consider how the state may best relegitimate itself in the face of the threat to its authority posed by vigilantism. There are various ways that the state may counteract vigilantism, including by means of exclusion (focusing on the policing and criminalisation of vigilante conduct) and inclusion (aimed at co-opting and integrating vigilantes in various capacities). A problematic tension inherent in the issue of state relegitimation is the need to take seriously the state's desire to condemn the (unconstitutional) use of force implicit in most vigilante activities, while simultaneously acknowledging the desirability of harnessing the (positive) crime-fighting energies of those who may understandably feel let down by state law-enforcement agencies. Crucially, any proposed solution(s) must be compatible with the state's self-legitimated identity as human rights guarantor and its concomitant constitutional obligations.

⁵¹ See B Baker "Multi-Choice Policing in Africa: Is the Continent Following the South African pattern?" (2004) 35 (2) *Society in Transition* 204 at 204-205; also B Baker *Multi-Choice Policing in Africa* (2008).

1 4 Underlying assumptions

A core premise of this research is that vigilantism has a distinctive status as a “moralistic crime”,⁵² and that as such, it is not merely yet another expression of seemingly senseless collective violence. An underlying assumption is therefore that vigilante violence can only be explained convincingly by taking vigilantism “out of the realm of the exotic”.⁵³ Vigilantism cannot simply be accounted for with reference to conventional theories of deviance,⁵⁴ since its dynamics and underlying motivations⁵⁵ are distinguishable from those of other forms of criminal behaviour – indeed, they are crucial for understanding and explaining it. This point of departure justifies studying vigilantism as a discrete legal phenomenon, and arguing in favour of specifically-targeted solutions to its criminal manifestations.

A second linked assumption is that understanding vigilantism as more than merely a private criminal activity requires recognising that while vigilantism is not invariably a direct response to (in)action by state agencies, vigilantes would be less inclined to resort to self-help if they perceived the state to be capable of satisfactory law and order maintenance. This conception of vigilantism as an “inevitable symptom of persistent and chronic state failure”⁵⁶ further implies that it is to a not insignificant degree within the power of the state to take positive steps to address the issue of vigilantism, and also to curb or eliminate many of its harmful manifestations.

A last crucial underlying assumption is that any state attempts to tackle vigilantism should be executed within a human rights framework. Solutions that promote the realisation of constitutionally-entrenched rights and freedoms – particularly human dignity – should at all times be preferred to those that unjustifiably undermine or limit them. This belief informs the proposal that

⁵² D Black “Crime as Social Control” in D Black (eds) *Towards a General Theory of Social Control Volume 2: Selected Problems* (1984).

⁵³ Huggins *Vigilantism and the State in Modern Latin America* 13-14.

⁵⁴ For more on attempts to use criminological theories to explain vigilantism, see Appendix A.

⁵⁵ *Contra* R Senechal De La Roche “Collective Violence as Social Control” (1996) 11 (1) *Sociological Forum* 97, who argues in favour of classifying collective violence without referring to its motivations or considering its ritualistic aspects or social function.

⁵⁶ J R Martin “Vigilantism and State Crime in South Africa” (2012) 1 (2) *State Crime* 217 219.

vigilantism be criminalised separately, as well as the notion that vigilante incorporation rather than exclusion should be considered where feasible.

1 5 Methodology

Reflecting *ex post facto* on this study's exact methodological approach, it was difficult to isolate the specific methodologies that were employed. While its aims were clear, the theoretical particulars of the way in they were to be achieved was less apparent. This mindset seems to be prevalent among the legal fraternity, with many colleagues in legal academia appearing to be of the view that legal scholars don't "do" methodology. To put it in more technical terms, it is sometimes said that in legal research, "explicit theoretical perspective is often lacking",⁵⁷ with the focus of research being *what* will be investigated, not *how*. Westerman remarks that the conflation of the "how" and "what" questions in legal research is due to law being simultaneously the object of research and the theoretical perspective from which that object is studied.⁵⁸ While this construction of law as a completely self-contained and unitary entity may well be misconceived,⁵⁹ there is no doubt that even diverse legal approaches still share certain norms and conventions. An attempt will be made to isolate the most common methodological approaches to legal research, and then to consider whether this study employs them primarily from an "insider" or an "outsider" perspective.⁶⁰

⁵⁷ P C Westerman "Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law" in M Van Hoecke (eds) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (2011) 88-89.

⁵⁸ 90.

⁵⁹ For more see R Cotterrell *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (2006) 30, where he deconstructs it as being "misleading and counterproductive", and § 1 5 2 below. For an example of the varying conclusions that may be reached by applying distinctive philosophies of law, see Fuller's "The Case of the Speluncean Explorers", discussed in M Douglas *How Institutions Think* (1986) 4-8.

⁶⁰ It must be noted that my fields of interest and expertise straddle the insider-outsider divide. On the one hand, I lecture criminal law and am legally trained, with various law degrees from Stellenbosch University (see M Nel *Incest: A Case Study in Determining the Optimal Use of the Criminal Sanction* LLM University of Stellenbosch (2003)). On the other, my interest in vigilantism was initially piqued during criminology studies at Cambridge University, which included completing a short thesis exploring the link between vigilantism and legitimacy (see M Nel *Crime as Punishment: The Legitimacy of Vigilantism* M.Phil in Criminology University of Cambridge (2005)), the insights of which have informed this more detailed and legally-orientated study.

1 5 1 *The nature of legal research and its implications for this study*

It may be useful first to highlight some typical characteristics of traditional legal research, briefly explaining the role of each in determining how law⁶¹ and social science are combined in this study.

First, law is largely a *hermeneutic* discipline, with texts and documents being the main research object, and the researcher being tasked with their interpretation.⁶² The aim of legal research is to scrutinise the precise meaning and scope of legal rules, concepts, principles and constructions in terms of coherence, fit and analogy.⁶³ The preoccupation of legal research is to interpret texts and argue about a choice among conflicting interpretations, or to balance a particular law with other laws or legal principles to determine their respective relevance and validity.⁶⁴ The inevitability of choosing a certain interpretation above alternative ones links with a second central characteristic of legal research, namely its normativity.

Normative questions relate to determining what “should be” – what is desirable – and not necessarily what “is”.⁶⁵ Legal research is an inherently *normative* discipline, both in the sense that it describes and systematises norms, and because, as noted above, it “takes normative positions and makes choices among values and interests”.⁶⁶ Decisions about which values or

⁶¹ Law may be concisely defined as a body of rules and norms that is distinguished from (the many) other systems of norms on the basis that it emanates from the state and that adherence to its rules is enforceable by means of state sanction. The relevant law at issue falls within the broader discipline of public law – i.e., the law dealing with the relationship between the state as authoritative power and its subordinates or subjects, or between different branches of state authority (C Snyman *Criminal Law* 6th (2014) 3). Within this field, the present focus is primarily on aspects of criminal law and criminal procedure. Criminal law is a state-imposed system of substantive rules and obligations that allows the state to prosecute and impose punishment on those that disobey its edicts, and criminal procedure comprises the formal rules whereby the rules of substantive law are enforced.

⁶² M Van Hoecke “Legal Doctrine: Which Method(s) for What Kind of Discipline?” in M Van Hoecke (eds) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (2011) 4; 11.

⁶³ 14; C McCrudden “Legal Research and the Social Sciences” (2006) 122 *Law Quarterly Review* 632 633-634.

⁶⁴ Van Hoecke “Legal Doctrine: Which Method(s) for What Kind of Discipline?” in *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 12.

⁶⁵ J Hage “The Method of a Truly Normative Legal Science” in M Van Hoecke (eds) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (2011) 27-28.

⁶⁶ Van Hoecke “Legal Doctrine: Which Method(s) for What Kind of Discipline?” in *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 10.

interests should take preference must be made, which entails giving more weight to some values or interests than others.

It is submitted that studying law as a normative system only from “the inside”, limiting one’s “empirical data” to purely legal sources,⁶⁷ is problematic – particularly when engaged in the study of a topic such as vigilantism. Focusing exclusively on legal sources risks overlooking the value of “law in action”,⁶⁸ as distinct from “law in the books”. The quest for “better law”⁶⁹ may be well expedited by considering elements that are external to law and legal doctrine, including insights from philosophy, morality and history, and empirical research undertaken in fields such as sociology, criminology, anthropology, economics and political science.⁷⁰ Failing to do so in appropriate circumstances may potentially undermine a third typical characteristic of legal research, namely its pragmatic, instrumental logic.

Westerman rightly observes that the aim of legal research is arriving at a good and workable order, with the quality of legal research being dependent on its outcome. The merit of the outcome of legal research is determined by such criteria as “coherence, consistency, practicality, effectiveness, legitimacy and fairness”.⁷¹ This technocratic, *instrumentalist* understanding of law is highlighted by Riles, who notes that “[t]o think like a lawyer is to think of law as a tool or a means to an end, whether one imagines law as a tool of social justice or a tool of corporate interests”.⁷² One could take it further: engaging in high-quality normative legal research surely entails using the best tools one may have at one’s disposal, including extra-legal ones.

Taking into account the three characteristics mentioned above, namely the hermeneutic, normative and instrumental nature of legal research, it is

⁶⁷ 2.

⁶⁸ This phrase is attributed to Roscoe Pound (1910): see McCrudden (2006) *Law Quarterly Review* 637.

⁶⁹ Van Hoecke “Legal Doctrine: Which Method(s) for What Kind of Discipline?” in *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 10.

⁷⁰ 10.

⁷¹ Westerman “Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law” in *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* 92-93.

⁷² A Riles “Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage” (2006) 108 (1) *American Anthropologist* 52 59.

apparent that interpreting and understanding the legal dimensions of vigilantism requires making value judgments relating to how best to use law to achieve a social outcome that addresses vigilantism in a manner that is, *inter alia*, fair and effective. Considering the paucity of vigilantism-related legal sources, this makes an engagement with non-legal sources inevitable. In undertaking a study conceptualising vigilantism from a distinctly legal perspective – something that has never before been done – it is therefore necessary to incorporate and employ non-legal sources so as to accomplish primarily legal aims. General sources from academic writings in the fields of *inter alia* sociology, criminology, anthropology and political science form an indispensable foundation for acquiring empirical information about vigilantism. Sources concerning related and analogous topics such as policing, penology, private security and restorative justice are utilised where appropriate to ascertain how vigilantism should be understood within a wider criminal justice-related context. Owing to the lack of legal information related specifically to vigilantism, legal and non-legal sources are at times perforce consolidated and used interchangeably as authority for the arguments advanced and conclusions reached, rather than separating out law and non-law. Law is combined with non-law for more than mere considerations of expedience, however. A transdisciplinary approach that deliberately integrates sources from law and the social sciences also serves to underline an important theme permeating this research, namely that even when undertaking legal research, distinguishing rigidly between law and non-law in practice is not only artificial, but may be unhelpful, since – as noted above – legal and extralegal approaches and objectives frequently overlap.

In line with the normativity of legal research, when discussing aspects of criminal law and procedure relevant to vigilantes in this study, the main aim is not to engage in a detailed legal analysis of what the law relating to vigilantes *is* at present – although the current legal position is certainly set out in chapters 2 and 6. Instead, the legal dimension on which the study centres is the normative aspect of jurisprudence – what the law *ought to be*. Since any kind of criminal penalty entails the infliction of discomfort or suffering, state punishment stands in particular need of moral justification to distinguish

it from forms of harm purposely inflicted on others by non-state parties. The need for law to correspond with justice is even more acute from a vigilante perspective. This is because vigilantes' central concern is not the nature of the law as such, but the relation between the official system of law and achieving decent standards of order and justice.⁷³

In determining how best to reform vigilante-related aspects of legal rules that fall short of the required standard for moral and legal justification, this study uses the Constitution of the Republic of South Africa⁷⁴ (the "Constitution") – and more specifically, the fundamental rights entrenched in its Bill of Rights – as the legal standard for evaluating and critiquing the current legal position and putting forward any claims about what the law should be. On the basis of these rights, it is also possible to establish how state authorities ought to act in their dealings with vigilantes "on the basis of a moral benchmark of what justice requires".⁷⁵ It will be argued that in attempting to combat vigilante violence the state has an imperative to further the interests of justice, upholding the "human dignity, equality and freedom"⁷⁶ of all citizens by promoting the common good in forward-looking, non-punitive,⁷⁷ restorative and procedurally fair ways.

It is recognised that a post-modern critique to this proposed approach (that has as its central concern questions about the best and most legitimate foundations of authority and sovereignty in the vigilante context), is that it does not prioritise issues relating to "how" power is actually exercised under such sovereignty.⁷⁸ Normative "what" questions have been given precedence since they are in line with the study's legal focus: a key preoccupation of law is, after all, that which is normative, evaluative and prescriptive. Choosing "what" over "how" questions is certainly not meant to imply that (for example)

⁷³ Abrahams *Vigilant Citizens* 154. Justice in this vigilante sense, says Abrahams, is "not so much a deep philosophical issue as a gut-level feeling of satisfaction that perceived wrongs are righted through the identification and punishment of those who perpetrate them".

⁷⁴ Constitution of the Republic of South Africa, 1996.

⁷⁵ R West *Normative Jurisprudence: An Introduction* (2011) 187.

⁷⁶ Constitution of the Republic of South Africa, 1996 s 36(1).

⁷⁷ Where appropriate and feasible.

⁷⁸ See C Gordon "Government Rationality: An Introduction" in G Burchell, et al. (eds) *The Foucault Effect: Studies in Governmentality* (1991) 7.

Foucault's concept of governmentality⁷⁹ and his insight that "government is not just a power needing to be tamed or an authority needing to be legitimized ... [but] is an activity and an art which concerns all and which touches each"⁸⁰ are not valid and useful for vigilantism research. Indeed, in § 4 2 3 this study does explore governmentality's links with the so-called "responsibilisation strategy" whereby the state sheds its "sovereign" style of top-down command and develops a form of rule involving the enlistment of others in the task of crime control,⁸¹ and considers responsibilisation's potential role in legitimising violent self-help.

1 5 2 Insider v outsider perspectives on law: positioning this study

There are numerous perspectives from which to undertake an examination of how the law may best address the social issue of vigilantism. According to Kempny,⁸² being reflexive about one's own positionality is not mere self-indulgence, but is instead a "self-conscious reflection of how one is located within certain power structures, and how this may influence methods, interpretations, and knowledge production". The distinction focused on here is the insider-outsider dichotomy: this study's own methodological perspective may only properly be determined by considering whether engagement with non-law is principally from the perspective of a legal insider or a legal outsider. The distinction between an "internal" and an "external" approach must be explained briefly.

Westerman's observation that the law is simultaneously the object of legal research and the theoretical perspective from which it is studied was

⁷⁹ Governmentality is a "modality that involves the enlistment of others, the shaping of incentives and the creation of new forms of cooperative action" (D Garland *The Culture of Control: Crime and Social Order in Contemporary Society* (2001) 125). See M Foucault "Governmentality" in G Burchell, et al. (eds) *The Foucault Effect: Studies in Governmentality* (1991) 102-103 for an extended definition of the term governmentality. See also D Garland "'Governmentality' and the Problem of Crime: Foucault, Sociology, Criminology" (1997) 1 (2) *Theoretical Criminology* 173 for ways in which the concept of governmentality is relevant in the criminal justice context.

⁸⁰ G Burchell, C Gordon & P Miller *The Foucault Effect: Studies in Governmentality* (1991) x.

⁸¹ See Garland *Culture of Control* 124-127.

⁸² M Kempny "Rethinking Native Anthropology: Migration and Auto-Ethnography in Post-Accession Europe" (2012) 2 (3) *International Review of Social Research* 39 42.

noted above.⁸³ This insight accords with an “internal” approach to legal research. Nelken argues that law has its own ways of interpreting the world: law as a discourse determines, in accordance with that discourse, what is to count as truth, and does so for specifically legal purposes. It provides its own explanations for the social world, interpreting social life in its own terms.⁸⁴ Thus traditional legal analysis is often viewed as an (at least relatively) autonomous field of experience or discourse that can “legitimately be described by reference to its own sources”.⁸⁵ In terms of this “internal” approach,⁸⁶ law is separated from its context and an attempt is made to word societal problems in exclusively legal terms that may be solved without considering anything that is not “law”.⁸⁷ The implication is not that legal “insiders” do not engage with other disciplines, but merely that they gauge the usefulness of such involvement in terms of its contribution to better “internal” legal analysis.⁸⁸

Such an “internal” approach to legal research may be contrasted with an “external” one, which emphasises the study of law at work within society as opposed to law existing in a social, economic and political vacuum.⁸⁹ In studying “law in action”, the externally-oriented researcher positions themselves as an “outsider”, rejecting the assumption that law is autonomous and self-contained, instead examining it using the same tools and methodologies used to study any other social phenomenon or political or economic practice.⁹⁰

Self-examination confirmed, as suspected, that this study’s point of view is predominantly a legal one. Having such a legal perspective is not somehow “less than” having a social science one – less intricate and insightful, more unproblematic and one-dimensional. Quite the reverse:

⁸³ At § 1 5 above.

⁸⁴ See D Nelken “The Truth About Law’s Truth” in A Febbrajo and D Nelken (eds) *European Yearbook in the Sociology of Law 1993* (1994) discussed in Cotterrell *Law, Culture and Society* 48.

⁸⁵ Quoted in McCrudden (2006) *Law Quarterly Review* 635.

⁸⁶ 633.

⁸⁷ M Van Hoecke *Methodologies of Legal Research: What Kind of Method For What Kind of Discipline?* (2011) vii.

⁸⁸ McCrudden (2006) *Law Quarterly Review* 635.

⁸⁹ 634.

⁹⁰ 641.

McCrudden rightly notes that the law is complex, nuanced and contested. It is:

“more often in the process of becoming, than settled. Law is not a datum; it is in constant evolution, developing in ways that are sometimes startling and endlessly inventive ... That is its fascination.”⁹¹

My fascination and engagement with the law is first and foremost that of an insider. This study does not claim to involve true socio-legal research, which is a typical “external” approach that uses empirical social science disciplines to investigate and understand the role of law as social phenomenon.⁹² Adhering to a legal paradigm – as opposed to one based on social science – does not mean that the benefits of drawing on non-law are undermined or trivialised, however. On the contrary: wanting to use the law to achieve social effects requires recognising the vital connection between law and social reality. The two are of necessity interdependent: whilst law is certainly a product of its social context, the social context is itself in part a product of law.⁹³

Indeed, the duality between the insider and outsider perspectives on legal research may be more apparent than real. According to Cotterrell, such an absolute dichotomy between legal insiders and outsiders is a “misleading and counterproductive” construction of certain kinds of legal thought that purport to close law off as self-contained and distinct from the non-legal environment.⁹⁴ He emphasises that there is not simply one community of legal interpreters, and law is “not a single system but a complex of overlapping systems of regimes of regulation”.⁹⁵ Depending on the standpoint of a particular legal interpretive community, it is a distinct possibility that those who would appear to non-lawyers to be “insiders” could find themselves to be

⁹¹ 648.

⁹² 637; Cotterrell *Law, Culture and Society* 55.

⁹³ McCrudden (2006) *Law Quarterly Review* 649.

⁹⁴ Cotterrell *Law, Culture and Society* 30.

⁹⁵ 36.

legal “outsiders” – observers rather than participants.⁹⁶ Cotterrell’s recognition of legal plurality and the fluidity of the inside-outside divide regarding legal research is both intriguing and appealing. It accords with the insight above regarding the complex and contested nature of law, and with McCrudden’s view that legal research:

“now embraces a pluralism of methodological approaches ... What is emerging are approaches that combine both the internal and the external approaches ... pinpointing what is distinctive about law as a social construction, as well as examining its inter-relationship with other social phenomena.”⁹⁷

The sociological enquiry embodied in this study may not have led to a “radical extension and reflexivity” of any understanding of the law,⁹⁸ but the study does embrace the incorporation of social science as an important tool for broadening legal understanding. Legal ideas function as a means of structuring and transforming the social world. Appreciating them in this sense, whilst recognising their power and limits,⁹⁹ is the first step towards understanding that law “is sometimes best studied not in isolation but as an element of a complex cultural milieu”.¹⁰⁰ The study attempts to reframe non-law (in particular the lived reality of vigilantes and their supporters, as observed from the point of view of the social scientist) by viewing it through a legal lens. As noted earlier,¹⁰¹ its engagement with the social sciences is chiefly transdisciplinary, as opposed to interdisciplinary. This implies that while results and perspectives are borrowed from other disciplines to illuminate the legal research undertaken, the study remains grounded in the law.¹⁰²

⁹⁶ 35.

⁹⁷ McCrudden (2006) *Law Quarterly Review* 642.

⁹⁸ Cotterrell *Law, Culture and Society* 62.

⁹⁹ 63.

¹⁰⁰ J M Conley & W M O'Barr “Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law” (1993-1994) 27 (1) *Loyola of Los Angeles Law Review* 41 44.

¹⁰¹ See § 1 5 1 above.

¹⁰² See M Gullestad “Overcoming the Division Between Anthropology 'At Home' and 'Abroad'” (2015-05-01) *EASA Online* <<http://www.easaonline.org/downloads/Gullestadeasa.pdf>> (2015-12-04) 9 for more on the distinction between “interdisciplinary” and “transdisciplinary”.

According to Nelken, when the law borrows from scientific disciplines and practices it seems to do so as it sees fit, taking what it deems useful, on its own conditions for its own purposes.¹⁰³ This rings true. The extensive drawing on non-legal sources and insights employed here remains instrumental at heart, with the primary purpose being problem-solving rather than the “thick description” beloved of anthropologists and their ilk.¹⁰⁴ The study’s reflection on empirical evidence such as ethnographic data is unabashedly from a predominantly theoretical perspective and at an abstract level. The aim is to use such data to come to general conclusions about how to understand and address vigilantism and related phenomena in a legal context *per se*, rather than to analyse in depth particular manifestations of vigilantism.¹⁰⁵ This exposes my research to the charge that I, like other legal scholars employing social science research for their own ends, am plagued by an:

“irksome sense of amateurism, of free play and frivolity about the details ... the propensity ... to play freely and loosely with concepts, to mix and match, to do some structuralism here and some psychoanalysis there without a clear sense of theoretical, epistemological, or ethical commitment”.¹⁰⁶

I plead guilty. When it comes to methodology, the crucial question for the purposes of this study is not the exact theoretical nature of the research method(s) employed, but rather whether the legal lens used will serve to illuminate and clarify – rather than distort and obfuscate – the social reality of vigilantism-plagued communities.

¹⁰³ Nelken “The Truth About Law’s Truth” in *European Yearbook in the Sociology of Law* 1993 101-102.

¹⁰⁴ Riles (2006) *American Anthropologist* 63.

¹⁰⁵ This is one of the primary reasons why this study does not consider the historical development of vigilantism in South Africa in any great depth.

¹⁰⁶ Riles (2006) *American Anthropologist* 57.

1 6 Outline of thesis

Following this introduction to the topic in chapter 1, chapter 2 of the study attempts to arrive at a working definition of vigilantism in a legal context. Previous attempts to define vigilantism are critically analysed and the elements of a proposed crime of vigilantism are identified and discussed systematically.

Chapter 3 elaborates on the usefulness of legitimacy for conceptualising the relationship between the state and those who engage in vigilantism. The various dimensions of legitimacy are explained in the context of vigilantism and the assumed link between (possibly deficient) state legitimacy and vigilantism is clarified.

Chapter 4 explores the factors precipitating state delegitimation (and hence, it is argued, an increased propensity for vigilantism). It examines various practical obstacles to effective state enforcement of criminal prohibitions, identifies ways in which the state's own policing strategies may inadvertently be encouraging vigilantism, and considers the implications of incongruent state and citizen law-enforcement beliefs for vigilantism.

Chapter 5 focuses on vigilante counter-legitimation strategies and rituals with the objective of comparing them to those utilised by the formal criminal justice system. By highlighting the differences and similarities in their respective aims, procedure, punishment, treatment of suspects, etc. the common ground, or lack of it, between state-sanctioned criminal justice and vigilantism may be better delineated.

In chapters 6 and 7, various possible state responses to vigilantism are outlined and critically evaluated. The discussion of state re-legitimation through exclusion in chapter 6 includes an elaboration of the relevant crimes with which vigilantes may be charged, the challenges faced by the state in prosecuting vigilantes *en masse* and how criminalising vigilantism separately may give the state scope to deal with vigilantes in more restorative ways. Chapter 7 considers *inter alia* the possibility of incorporating vigilantes into

already-existing state-sanctioned policing or dispute resolution initiatives, and reflections on how community crime-fighting zeal may be channelled whilst maintaining the necessary formal oversight. In addition, more general state strategies aimed at rectifying the legitimacy problems identified in chapter 4 are posited.

Chapter 8, the last chapter of the study, concludes with some remarks on the significance of vigilantism in the South African legal context and makes final recommendations as to how to approach this vexing issue in a manner that balances a respect for human rights with the need to acknowledge community law-enforcement concerns.

2 CHAPTER TWO: WHAT IS VIGILANTISM?

2 1 Introduction

The aim of this chapter is to formulate a workable definition of vigilantism for use in the legal context. A back-to-basics strategy will be employed to arrive at a legally defensible definition for vigilantism, necessitated by the fact that case law and other legal sources are of no real assistance in this regard. The systematic approach followed utilises the general principles of criminal liability as a logical framework for conceptualising the nature of the conduct engaged in by vigilantes. The requirements identified for the crime of vigilantism are thus conceived of as individualised variants of the well-established elements that need always to be proved beyond reasonable doubt before criminal liability may ensue. The reason for using the elements of the crime as a point of departure for understanding vigilantism from a (criminal) law perspective is that vigilantism must be defined in terms of it being conduct that is (at least *prima facie*) criminal. This observation may appear self-evident, but as will become clear in due course, non-legal attempts to define vigilantism often tend to lose sight of it.¹ Taking this into account, the discussion below corresponds roughly with the key elements that the state must prove to convict someone of a crime, namely: that the person must have acted in a manner *that is proscribed by law* (*actus reus* or conduct); that the act in question is *unjustified* (unlawfulness); and that the person can be *blamed* for their unlawful conduct (*mens rea* or fault). Relevant aspects of these elements are considered critically and in detail, following which the chapter concludes by arguing in favour of the separate criminalisation of vigilantism. A legal definition of a proposed crime of vigilantism is put forward, and its essential components explained. This definition is the point of departure for the analysis of vigilantism in subsequent chapters.

¹ See Johnston (1996) *British Journal of Criminology* for an example in the context of criminology.

2 2 Background and history

Before embarking on an attempt to define vigilantism legally, however, it is necessary to outline the origin and history of the term vigilantism. Etymologically, the word “vigilante” is originally a Spanish adjective meaning “watchful”, and as a noun is mainly used to mean a “watchman” or “guard” in that language. Its Latin root is the adjective *vigilantem* (nominative *vigilans*), which means “watchful, anxious or careful”. The word “vigilante” was adopted into North American English in the nineteenth century, entering popular vocabulary through the (1866) writings of Thomas Dinsdale. He wrote about the 1860s Vigilantes of Montana, a group of concerned citizens who organised themselves against a corrupt local sheriff and other “undesirables” who crossed their path.² The word, and the common related term “vigilance committee” or “vigilant society” seemed to have had chiefly positive connotations. Those opposed to the activities of such groups pejoratively referred to them as “stranglers”.³ Other early vigilante groups were referred to as “regulators” and “moderators”, or had more specific titles such as “White Caps”⁴ and the notorious Ku Klux Klan. Abrahams⁵ notes that it is only more recently that there has been a growing tendency in North America to view the term “vigilantism” – with its associations of violence – more disapprovingly.

In early British contexts the term “vigilante” does not seem to have been used, but – in all likelihood as a result of the violent activities of American vigilante groups – it has long had negative connotations.⁶ In English, the collection of words that include “vigil”, “vigilance” and “vigilante” co-exist with a second set that has partly overlapping meanings, including “wake” “watch” and “watchful”. These words are Germanic in origin, but appear to share the same ancient Indo-European roots as their Latin

² R G Abrahams “What’s in a name? Some thoughts on the vocabulary of vigilantism and related forms of ‘informal criminal justice’” in D Feenan (eds) *Informal Criminal Justice* (2002) 27.

³ Abrahams *Vigilant Citizens* 4-5; Abrahams “What’s in a name?” in *Informal Criminal Justice* 27.

⁴ It is interesting to note that a South African conservative vigilante group operating in Cape Town in the 1980’s called themselves the *Witdoeke* (white cloths) (L Buur & S Jensen “Introduction: Vigilantism and the Policing of Everyday Life in South Africa” (2004) 63 (2) *African Studies* 139 142), although this link may be purely coincidental.

⁵ Abrahams “What’s in a name?” in *Informal Criminal Justice* 27.

⁶ 27.

counterparts.⁷ Curiously, however, in contemporary English usage the idea of “neighbourhood watch”, which generally implies non-violence and co-operation with police, is often used in sharp contrast to vigilantism.⁸

In 1980s South Africa, the term “vigilantes” connoted violent, organised and reactionary groupings operating within black communities, which, although not receiving official recognition, were politically directed in the sense that they acted to neutralise individuals and groupings opposed to the apartheid state and its institutions.⁹ In the post-1994 democratic era vigilantes do not direct their actions against political opponents so much as address issues relating to crime and disorder.¹⁰ In addition, as will become apparent, the vigilante mandate does not confine itself to addressing pure crime, but also encroaches into the sphere of the enforcement of non-criminal norms. While vigilantism’s historical roots cannot be ignored, it is contemporary vigilantism that is the focus of the present study.

2 3 Legal challenges

Now that the origin and historical context of the word vigilantism have been explained briefly, a distinctly legal meaning of the term must be considered. It has already been noted¹¹ that there is a dearth of helpful case law to draw on as a resource when conceptualising and characterising vigilantism in a distinctly legal way. Indeed, the paucity of legal mentions of vigilantism, let alone nuanced and reflective ones, is striking. Vigilantism is only very occasionally referred to in court judgments, and when it is, such references tend to be superficial and unsubstantial. No authoritative South African case law could be identified where vigilantism is defined, as opposed to merely being referred to. Courts seem content to adopt the attitude of

⁷ Abrahams *Vigilant Citizens* 5.

⁸ See, for example, L Johnston “Crime, Fear and Civil Policing” (2001) 38 (5-6) *Urban Studies* 959, who makes a clear distinction between “responsible citizenship” as embodied by groups such as neighbourhood watches, and “autonomous citizenship”, which includes acts of vigilantism. However, in § 7 4 3 it will be seen that South African vigilantes co-opted as neighbourhood watch members seem to find it very hard to turn away completely from their former violent tendencies.

⁹ Haysom *Vigilantes: A Contemporary Form of Repression*. See also § 1 2 1 above.

¹⁰ Harris *As for Violent Crime That’s Our Daily Bread* 7.

¹¹ See §§ 1 5 1 and 2 above.

Justice Stewart when he defined obscenity simply by declaring: “I know it when I see it”.¹² There has been no legislative attempt to define or to consider vigilantism in depth either. The national spokesperson for the Department of Justice and Correctional Services recently acknowledged, “Mob justice is not defined [in law] and it has never been considered [as a separate phenomenon], it’s covered by specific offences.”¹³

While the courts and the executive acknowledge that vigilantism exists, they seem to share popular culture’s reflexive – albeit unreflective – assumption that vigilante violence deserves harsh condemnation. Without exception, the case law considering vigilantism has something negative to say about it. Sometimes the objections are vague and all-encompassing, such as Hoffman AJ’s reference in *S v Schrich*¹⁴ to “the serious threat which vigilante action poses to the very fabric of society as we know it”. In the same vein, Brusser AJ in *Jansen v S* declined to reduce the sentences of disciplinary committee members for kidnapping and serious assault with a sjambok, stating:

“[T]o do so would be lending the court’s approval to vigilantism and anarchy, which as I have set out above, a court should never do. As much as the civil law frowns upon self help even more so should the court frown on self help in criminal cases.”¹⁵

The judiciary usually dismisses out of hand self-help in general, of which vigilantism is but one manifestation. For example, in *Chief Lesapo v North West Agricultural Bank* it was held:

“No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law

¹² *Jacobellis v Ohio* 378 US 184 (1964) 197.

¹³ N Prince “Call For ‘Mob Justice’ Policy” (2015-04-07) *IOL News* <<http://www.iol.co.za/news/crime-courts/call-for-mob-justice-policy-1.1841537#.VS0Fz0IwyfQ>> (2015-04-14).

¹⁴ *S v Schrich* 370D.

¹⁵ *Jansen v S* 5.

prevails ... Taking the law into one's own hands is ... inconsistent with the fundamental principles of our law.”¹⁶

While invariably subjecting those who take the law into their own hands to severe criticism, members of the judiciary have nevertheless on occasion acknowledged that vigilante acts are on some level rational and explicable – an almost understandable form of the administration of “justice” carried out by community “courts”. A good example of this contradictory stance is Navsa JA’s statement in *S v Thebus*:

“This case clearly demonstrates that law and order break down even further with catastrophic consequences when vigilante action is resorted to ... Ignoble methods can never serve an ostensibly noble cause. Law enforcement agencies will do well to note that inaction and apathy on their part lead to this kind of behaviour.”¹⁷

On the one hand, Navsa JA summarily condemns vigilantism because of its barbaric methods; but on the other, he takes judicial notice of the fact that vigilante acts are simply straightforward attempts to advance the “noble” cause of addressing a long-standing and ongoing problem, namely the state’s woefully inadequate response to societal order and security demands. That vigilantes can at once evoke both the (overt) condemnation and the (perhaps subliminal) sympathy of the criminal justice system makes vigilantism a fascinating subject for legal inquiry. Exposing such judicial equivocality is the first step towards arriving at a definition of vigilantism that views it not as black or white, but as a more subtly-shaded “twilight” phenomenon.¹⁸

The failure to conceptualise vigilantism clearly is by no means confined to the purely legal sphere. Even the 2014 Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community in Khayelitsha (“Khayelitsha Commission”), which came into being as a direct result of numerous incidences of vigilantism in the township, and one of the primary aims of

¹⁶ *Chief Lesapo v North West Agricultural Bank and another* 2000 1 SA 409 (CC) para 11.

¹⁷ *S v Thebus and another* 2003 2 SACR 319 (CC) 578J-H.

¹⁸ Lund (2006) *Development and Change*; Lund (2006) *Development and Change*.

which was to investigate vigilantism, makes little attempt to explain what it means *per se*. It confines itself to the following terse definition of vigilantism: “actions of the community to punish people perceived as offenders”.¹⁹

The underlying judicial attitude of ambivalence towards vigilantism noted above is replicated in non-legal contexts. This is exemplified by the frequent use of oxymoronic terminology such as “popular justice”, “vigilante justice”, “kangaroo court”,²⁰ “lynch-justice”,²¹ “vengeance attacks”,²² “rogue justice”,²³ “mob justice”²⁴ and “Bundu Court killings”²⁵ to refer to the phenomenon. A term such as “mob justice” combines the notion of a “mob” – the “unstable or excitable crowd”, the common, disorderly and riotous mass of the people²⁶ – with the connotations of peace, respect, moral rightfulness and objectivity invoked by the word “justice”. Abrahams observes that vigilantism may confusingly combine opposing elements: “sectional and common interests, conservatism and radicalism, elitist and populist values, intolerance and caring decency”.²⁷ The coexistence of these antagonistic or disparate elements that characterises vigilantism may help account for the tendency to describe, and respond to, this phenomenon in such an ambivalent manner.

However, highlighting the internal contradictions of judicial, and other, responses to vigilantes does not advance this chapter’s cause of arriving at a legal definition of vigilantism a great deal. Notwithstanding Buur and Jensen’s warning that vigilantism should be studied “as practice rather than an object of analysis with clear-cut conceptual and empirical boundaries”,²⁸ the central task of unpacking vigilantism by identifying its constituent elements must now

¹⁹ C O’Regan & V Pikoli *Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha* (2014)385-386.

²⁰ See SAPA “Vigilantes’ in Court for Kidnapping, Assault” (2014-07-20) *IOL News* <<http://www.iol.co.za/news/crime-courts/vigilantes-in-court-for-kidnapping-assault-1.1717887#.VQQE-0IwyfS>> (2015-03-14).

²¹ *S v Basson* 2011 JDR 0827 (Nm) para 5.

²² O’Regan & Pikoli *Khayelitsha Commission Report* 385.

²³ C Africa, J Christie, R Mattes, M Roefs & H Taylor *Crime and Community Action: Pagad and the Cape Flats, 1996-1997* (1998) 3.

²⁴ O’Regan & Pikoli *Khayelitsha Commission Report* 385.

²⁵ According to O’Regan & Pikoli *Khayelitsha Commission Report* 385, this is the term used by the South African Police Service (“SAPS”).

²⁶ Abrahams “What’s in a name?” in *Informal Criminal Justice* 30.

²⁷ 25.

²⁸ (2004) *African Studies* 148.

be addressed. A *caveat* is required here: it would be presumptuous to assume that a multifaceted, labile and slippery phenomenon such as vigilantism could easily be reduced to a straightforward definition. Hence, delineating the characteristics or general elements of vigilantism must be regarded as illustrating an “ideal type”,²⁹ an archetype (albeit somewhat individualised for operationalisation in a South African context). The “ideal type” (a term coined by sociologist Max Weber) is an analytical construct that employs the hypothetical conceptualisation of the phenomenon being scrutinised to serve as a yardstick against which real-life manifestations thereof may be compared.³⁰ According to Martin, the aim of constructing such a “perfect” example is to provide conceptual clarity as well as a useful comparative tool “unaffected by the ‘messiness’ of real-life empirical observation”.³¹ For this reason, the “ideal” elements of vigilantism identified below are certainly not meant to approximate all instances of vigilantism in practice, let alone constitute an exhaustive substantive picture from which no aspect of a particular vigilante act could ever deviate. While some examples of individual vigilante practices are referred to, the focus of the discussion in this chapter is relatively general, elaboration about the specifics of vigilante behaviour being reserved for later chapters.

2 4 Conduct proscribed by law

For criminal liability to ensue, the first step is to identify a particular perpetrator or perpetrators. Compliance with the conduct element of the crime requires the state to prove that a human being has committed an act that has been defined as criminal by a competent lawmaker. When addressing this element in relation to vigilantism, two aspects in particular require further consideration. First, the notion of who the human being is who perpetrates an act of vigilantism must be expanded upon, raising questions

²⁹ R G Abrahams “Some Thoughts on the Comparative Study of Vigilantism” in D Pratten and A Sen (eds) *Global Vigilantes* (2007) 443.

³⁰ Abrahams *Vigilant Citizens* 7; Abrahams “What’s in a name?” in *Informal Criminal Justice* 26.

³¹ J R Martin “Vigilantism and Informal Social Control in South Africa” (2010) 23 (3) *Acta Criminologica* 53 58.

such as the following: Is vigilantism necessarily a group activity, or would a “lone vigilante” also warrant inclusion? And, is vigilantism committed by private individuals only, or may state agents also be vigilantes? Second, the nature of vigilante conduct itself needs to be unpacked, and some typical manifestations identified. In particular, the violent nature of much vigilante conduct must be highlighted.

2 4 1 Vigilante perpetrators

2 4 1 1 Group or individual or both?

The first question to be addressed is whether vigilantism is necessarily a group phenomenon. While individual vigilantes are certainly not unheard of, vigilantism is more commonly carried out as part of a group.³² Terms like “mob justice” used synonymously with vigilantism cement the popular perception that vigilante acts are committed collectively. Indeed, scholars such as Senechal De la Roche appear to view vigilantism purely as a form of group conduct, classifying it as a form of “collective violence”.³³ Similarly, Baker, who regards vigilantism as a form of informal policing, is of the view that it entails some degree of organised action, which implies that it is perpetrated by a group rather than single individuals.³⁴ Swanepoel and Duvenhage’s definition also limits vigilantism to the collective context.³⁵ In addition, all the examples of vigilante action cited in the Khayelitsha Commission’s report depict it as being committed by more than one person.³⁶ The Commission heard testimony from witnesses relating to the “whole community”³⁷ participating in a vigilante assault and killing, a “large group of boys attack[ing] and stabb[ing] [a robbery suspect] to death”,³⁸ “a group of

³² Abrahams “What’s in a name?” in *Informal Criminal Justice* 26.

³³ Senechal De La Roche (1996) *Sociological Forum*.

³⁴ Baker (2004) *Society in Transition* 207.

³⁵ L Swanepoel & A Duvenhage “Vigilantism as a Feature of Political Decay in the Post-1994 South African Dispensation” (2007) 39 (1) *Acta Academia* 123 127.

³⁶ See, for instance, O’Regan & Pikoli *Khayelitsha Commission Report* 90-95.

³⁷ 91.

³⁸ 93.

community members ... a large crowd”³⁹ killing a suspected robber, and “approximately among 40-50 ... members of the community in the mob”⁴⁰ severely assaulting a man while police looked on. Unsurprisingly, then, the Khayelitsha Commission report’s definition of vigilantism – “*actions of the community to punish people perceived as offenders*”⁴¹ – implies group participation, rather than the conduct of a lone individual in the community.

The collective nature of South African vigilantism is also reflected in recent media reports about vigilante conduct, which focus on seemingly ubiquitous spontaneous mob justice in the vast majority of instances. A few examples include: a group of twenty men armed with “hammers, axes, stones, knives and glass bottles” attacking and killing a foreigner who had stabbed and killed a suspected thief;⁴² members of the community allegedly “organis[ing] themselves and conduct[ing] a manhunt” before beating to death a man suspected of robbery, rape and murder;⁴³ and a group of fifteen people kidnapping suspected criminals, subjecting them to a “kangaroo court” and assaulting them.⁴⁴

Case law on spontaneous acts of vigilantism is rare, probably owing to the fact that such vigilantism is “shrouded in a conspiracy of silence”.⁴⁵ Incidents are often not reported, and witnesses are reluctant to come forward for fear of intimidation, posing a challenge to police and prosecutors alike.⁴⁶ Case law mentioning vigilantism tends to focus on its more organised collective manifestations, including: *S v Thebus*,⁴⁷ where members of the vigilante group People Against Gangsterism and Drugs (“PAGAD”) were

³⁹ 94.

⁴⁰ 94-95.

⁴¹ 385-386 (emphasis added).

⁴² S Mukadam “Mob’s Bloody Vengeance” (2013-06-27) *IOL News* <<http://www.iol.co.za/news/crime-courts/mob-s-bloody-vengeance-1.1538636#.VQQHZUIwyfR>> (2015-03-14).

⁴³ SAPA “Three in Court for Mob Attack Video” (2014-05-16) *IOL News* <http://www.iol.co.za/news/crime-courts/three-in-court-for-mob-attack-video-1.1689744#.VQQF_EIwyfS> (2015-03-14).

⁴⁴ SAPA “‘Vigilantes’ in Court for Kidnapping, Assault” *IOL News*.

⁴⁵ Swanepoel & Duvenhage (2007) *Acta Academia* 126. See also A Von Schnizler, G Dithlage, L Kgalema, T Meapa, T Mofokeng & P Pigou *Guardian or Gangster? Mapogo A Mathamaga: A Case Study* (2001) 21 for more on fear as a means by which vigilante group Mapogo A Mathamaga wields influence.

⁴⁶ See § 5 4 1 1 for more on the “conspiracy of silence” surrounding acts of vigilantism.

⁴⁷ *S v Thebus*.

involved in a shoot-out with alleged drug dealers; *S v Jansen*⁴⁸ where members of the *Beaufort-Wes Gemeenskapsvereniging* kidnapped and brutally beat the complainant with sjamboks; *S v Mlotsana*,⁴⁹ where members of a stock-theft-fighting group called *Iliso-lomzi* kidnapped and tortured⁵⁰ suspected housebreakers; *S v Whitehead*,⁵¹ where a group of more than 70 (white) men attacked and bludgeoned striking (black) municipal workers; *S v Zuko*,⁵² which concerned members of an organisation of business-people called *Masizake* apprehending and assaulting suspected robbers; *S v Schrich*,⁵³ involving PAGAD G-force members on a mission to shoot drug lords and gangsters; and *Mzanywa v Minister of Safety and Security*,⁵⁴ where members of the community resolved to assault three suspected thieves, and then found and assaulted them severely with sjamboks.

As illustrated above, the type of vigilantism most prevalent in South Africa is definitely collective action, but “lone vigilantes” are not unheard of. A good example from case law is the instance of Joshua,⁵⁵ a resident of Delft (a gang-ridden suburb of Cape Town) whose wife had been robbed at knifepoint. Joshua went in search of the robbers armed with a shotgun. He confronted a group of teenage Hard Livings gang members, one of whom fitted the description of one of his wife’s robbers, and demanded his wife’s purse. This youth (Marlin) swore at him, threatened him with a broken bottle, and gave a command to the other group members that Joshua perceived as threatening. Joshua’s response was to shoot and kill not only Marlin, but also two of the other gang members who were attempting to run away (Mervin and Fabian) and to injure a third (Ivan). He then chased a fourth youth (Etienne) and followed him in the direction of a nearby residence, where he shot and killed two other men (Jacobs and Hassan) and a dog, seemingly unprovoked.

⁴⁸ *Jansen v S*.

⁴⁹ *Mlotsana and others v S* [2005] JOL 15458 (Tk).

⁵⁰ Unless otherwise specified (see § 4.2.7.2 below), this study uses torture in its generic, non-legal sense to refer to the infliction of brutal or severe pain or suffering, which is not necessarily imposed by state agents.

⁵¹ *Whitehead and others v S* [2006] JOL 17765 (NC); *S v Whitehead and others* 2008 1 SACR 431 (SCA).

⁵² *Zuko v S* [2009] 4 All SA 89 (E).

⁵³ *S v Schrich*.

⁵⁴ *Mzanywa v Minister of Safety and Security* [2005] JOL 16112 (Ck).

⁵⁵ See *S v Joshua* 2003 1 SACR 1 (SCA).

Although the court never uses the word “vigilante” to describe Joshua, it is clear that his initial act at least was prompted by a desire to resort to self-help against those he thought had attacked his wife. On appeal Joshua argued that he had shot because he believed himself to be in danger, and was acquitted of the murder of Marlin and the attempted murder of Ivan, found guilty of culpable homicide in respect of Mervin and Fabian’s deaths, but convicted of murdering Jacobs and Hassan.⁵⁶

While the lone vigilante appears to be the exception in South African literature, this manifestation of vigilantism is frequently mentioned in vigilante texts from other jurisdictions. Only four of the eleven examples of vigilantism mentioned by Les Johnston in his seminal article on vigilantism⁵⁷ are of a collective nature, with the same number being individual vigilantes and the remainder groups of less than four. Media reports of vigilantism from outside Africa tend to follow this trend. A typical example is the story of Stinson Hunter, a self-styled “paedophile hunter” who sends “messages purporting to come from a young girl to men on adult websites”, thereby luring them to engage in child sexual grooming.⁵⁸ He is described in the article as a “vigilante” although, as is elaborated on later at § 2 4 2, the fact that his conduct does not even threaten the use of force means it would fail to fulfil that proposed element in the definition of vigilantism.⁵⁹

In summary, while the existence of the “lone vigilante” shows that vigilantism is not a purely collective phenomenon, South African vigilantes do most often engage in acts of group violence. A question that still remains is how the criminal justice system should respond to such collective aggression. It is not possible to convict “the mob” as such for murder or assault, but it is often difficult, if not impossible, to ascertain which particular group member

⁵⁶ The legal principles relating to private defence and putative private defence applied in this case are discussed in more detail at §§ 2 5 1 and 2 6 2 below.

⁵⁷ Johnston (1996) *British Journal of Criminology*.

⁵⁸ I Burrell “The Paedophile Hunter: Vigilante’s Success Adds to Pressure for Greater Police Resources in Child Sex Crackdown” (29-09-2014) *The Independent* <<http://www.independent.co.uk/news/uk/crime/the-paedophile-hunter-vigilantes-success-adds-to-pressure-for-greater-police-resources-in-child-sex-crackdown-9763501.html>> (14-03-2015).

⁵⁹ The violent and community-orientated nature of South African vigilantism – in contrast to its seemingly more individualistic and less violent first world counterpart – is explored further in chapter 5 below.

was responsible for the harm caused, thereby assigning individual blame. Should members of a vigilante group be held personally accountable as murderers for merely encouraging the actual perpetrators to kill or assault, where their own degree of involvement in carrying out the violence itself is minimal or non-existent? Such controversial issues – including whether it is indeed in accordance with the state’s human rights obligations to impose collective liability – are explored further in § 6 3 2 2 with specific reference to the common purpose doctrine, which potentially allows for violent acts committed by one member of a vigilante group to be imputed to all other group members, provided the criminal conduct falls within the scope of their common design.⁶⁰ At this point, however, it is apposite to continue with the attempt to conceptualise vigilantism.

2 4 1 2 *Acting in private capacity*

One of the six vigilantism requirements proposed by Johnston is that it must be private individuals who undertake vigilante acts, not state agents.⁶¹ This is contrary to the opinion of the numerous authors who also classify as vigilantism abuses of power by state agents (such as policemen) who identify with the established order and use excessive force to maintain that order.⁶² It is submitted that the perspective that perpetrators of vigilantism are just ordinary, private citizens has much to commend it. Defining vigilantism broadly enough to include all forms of “establishment violence”,⁶³ irrespective of whether its source is public or private, obscures the significant differences between public abuse of power and private vigilantism, and runs the risk that neither phenomenon is explained satisfactorily.⁶⁴

⁶⁰ J Burchell *Principles of Criminal Law* 4th (2013) 467.

⁶¹ Johnston (1996) *British Journal of Criminology* 224. The view is endorsed by numerous others, including Baker (2004) *Society in Transition* 207; Abrahams “What’s in a name?” in *Informal Criminal Justice* 26; and Swanepoel & Duvenhage (2007) *Acta Academia* 127.

⁶² See, e.g., Cooper-Knock & Owen (2015) *Theoretical Criminology*; Rosenbaum & Sederberg *Vigilante Politics*; P Sederberg “The Phenomenology of Vigilantism in Contemporary America” (1978) 1 *Terrorism* 287; Huggins *Vigilantism and the State in Modern Latin America*; Bruce & Komane (1999) *Crime and Conflict* 41.

⁶³ As do Rosenbaum & Sederberg *Vigilante Politics* 10.

⁶⁴ Johnston (1996) *British Journal of Criminology* 225.

However, Johnston's contention that state agents such as the police are "automatically barred"⁶⁵ from performing vigilante actions is open to doubt. His view is that police officials continue to enjoy full police powers even when off duty; thus their conduct can never truly be "private" for the purposes of this element of vigilantism.⁶⁶ It is submitted, however, that determining whether state agents can be termed vigilantes or not should not depend on whether they possess (nominal) off-duty state powers. Instead, what is decisive is whether they view themselves (subjectively) as "willingly accountable"⁶⁷ to the state for their actions, and also whether (objectively) they are acting within the course and scope of their employment at the time of the relevant conduct. The question of when a state employee's criminal conduct may be regarded as being performed under the authority of the state was considered in *K v Minister of Safety and Security*⁶⁸ in the context of the law of delict. Three off-duty policemen in uniform had raped K, and the court had to determine whether the Minister could be held vicariously liable for their actions. Here, the court endorsed the subjective and objective dimensions mentioned above, finding that the test for vicarious liability contains:

"both a factual assessment (the question of the subjective intention of the perpetrators of the delict) as well as a consideration which raises a question of mixed fact and law, the objective question of whether the delict committed is 'sufficiently connected to the business of the employer' to render the employer liable".⁶⁹

O'Regan J concluded that despite the fact that they had been pursuing their own objectives at the time they committed the rape, the policemen had simultaneously breached their duty as state employees to protect K, a member of the community, from harm. K had trusted them enough to accept their offer of a lift because they were policemen, and thus a sufficiently close

⁶⁵ T Dumsday "On Cheering Charles Bronson: The Ethics of Vigilantism" (2009) 47 *Southern Journal of Philosophy* 49 52.

⁶⁶ Johnston (1996) *British Journal of Criminology* 224-225.

⁶⁷ Dumsday (2009) *Southern Journal of Philosophy* 53.

⁶⁸ *K v Minister of Safety and Security* 2005 6 SA 419 (CC).

⁶⁹ Para 45.

connection between their wrongful conduct and the nature of their employment had been demonstrated for delictual liability to ensue.⁷⁰

In terms of this reasoning it would be very hard to envisage a scenario where a policeman was acting in their own private capacity while performing purported vigilante acts, since resorting to vigilantism is inextricably intertwined with a perceived lack of policing. It is nevertheless submitted that it is necessary to evaluate each set of facts on its own merits, and that it may be conceivable for policemen or other state officials to abandon their employment in a sufficiently decisive manner by engaging in a vigilante “frolic of their own” that their conduct could in no way be regarded as merely amounting to an abuse of state power. In *S v Schrich*, for instance, the appellant was still a member of the South African National Defence Force (“SANDF”) when he embarked on a mission to shoot drug-lords and gangsters as a member of the vigilante group PAGAD’s “G-force”. The appellant was explicitly labelled as a vigilante by the state: the prosecution distanced themselves from his conduct and argued in aggravation of sentence that “[v]igilante action cannot be tolerated by society”.⁷¹ Schrich no doubt perceived himself as a vigilante acting in his private capacity too, despite ostensibly being a state agent. Thus his conduct could plausibly meet the “private citizen” vigilantism requirement for present purposes.

In contrast, there are the unfortunately all-too-frequently reported instances of police officials turning a blind eye to acts of vigilantism – or even being in cahoots with vigilantes themselves. For example, a witness testifying before the Khayelitsha Commission told of a brutal and noisy vigilante attack that happened only metres away from the restaurant where a group of plainclothes policemen were having lunch. They did not intervene, and it was left to the uniformed policemen who arrived 15 minutes later to rescue the victim.⁷² Similarly, Harris notes that some respondents in her study perceived the police as supporting, or even participating in, acts of vigilantism, which

⁷⁰ Para 57.

⁷¹ *S v Schrich* 363I.

⁷² O’Regan & Pikoli *Khayelitsha Commission Report* 94-95.

“paints police with a vigilante label themselves”.⁷³ In both of these kinds of scenario the police appear to be acting (or failing to do so!) in their official capacity, and for this reason it is suggested that their crime amounts to a public abuse of power as opposed to a private act of vigilantism.⁷⁴

By exploring the motivations of private vigilantes as distinct from – and, indeed, not infrequently opposed to – state concerns and priorities, this study hopes to shed light on the dynamics of vigilantism as a *reaction to* perceived state inadequacies. It also makes sense to limit the conceptualisation of vigilantism as a distinctly criminal phenomenon to instances which concern the relationship between the state as an authoritative power and the private (vigilante) individual as subject of such power,⁷⁵ and not to muddy the waters by considering vigilantism to include instances of state abuse of power.

Now that it has been shown that this study limits the definition of vigilantism to the conduct of private citizens (possibly including state agents acting in their private capacity), exactly what these private citizens do that amounts to vigilantism must be expanded on.

2 4 2 What prohibited conduct do vigilantes typically perpetrate?

Violence has been described as an “integral feature of vigilante methodology”,⁷⁶ and this viewpoint must be endorsed. Vigilante violence appears to be an exercise of social control⁷⁷ in response to the “real or perceived deviance”⁷⁸ of the “generic criminal”.⁷⁹ The precise reasons for exercising such force are considered in depth at § 2 6 3 below. The aim of the discussion at this point is not to focus on why vigilantes do what they do, or even whom they target, but merely to show that their conduct does indeed

⁷³ Harris *As for Violent Crime That’s Our Daily Bread* 28.

⁷⁴ See § 7 3 2 for more on the police turning a blind eye to acts of vigilantism.

⁷⁵ Snyman *Criminal Law* 3.

⁷⁶ Harris *As for Violent Crime That’s Our Daily Bread* 4.

⁷⁷ Black “Crime as Social Control” in *Towards a General Theory of Social Control Volume 2: Selected Problems* 13.

⁷⁸ Johnston (1996) *British Journal of Criminology* 230.

⁷⁹ L Buur “Crime and Punishment on the Margins of the Postapartheid State” (2003) 28 (1) *Anthropology and Humanism* 23 25.

(at least potentially) comply with the definitional elements of various serious offences, thus underscoring the *prima facie* criminal nature of what they do.

Empirical studies and media reports of vigilantism seem to concur: vigilantism is associated with violent methods and corporal punishment. Most academic definitions of vigilantism assume that violence – or the threat thereof – is an essential component of vigilantism.⁸⁰ Even authors who do not concede that vigilantes necessarily engage in forceful action note that only groups who at least permit the use of force as part of their “operational philosophy” may qualify as vigilantes.⁸¹ Lee and Seekings make the telling point that the threat of violence is implicit in even the most peaceful forms of community court, which makes it difficult to distinguish meaningfully between “a non-violent and restitutive form of popular justice, rooted in and accountable to the ‘community’, and a violent and punitive form of popular justice executed by irresponsible and ‘lawless’ individuals”.⁸² Johnston,⁸³ Martin⁸⁴ and Dumsday⁸⁵ concur with Rosenbaum and Sederberg that while “[v]iolent force may not be used on all occasions ... its future utilization is always implied”.⁸⁶

The forceful (and criminal) acts potentially committed by vigilantes to achieve their “crime-fighting” objectives may be divided into two main categories: crimes against specific victims, and crimes against wider community interests, including the interests of the state. The former category may again be sub-divided into crimes against the life and bodily integrity of the target of vigilantism, and crimes against the vigilante victim’s property. Relevant crimes against life and limb with which vigilantes may be charged include murder; attempted murder; culpable homicide; assault with intent to cause grievous bodily harm; common assault and kidnapping. Arson and malicious damage to property are property crimes typically associated with

⁸⁰ Buur & Jensen (2004) *African Studies*; Abrahams “What’s in a name?” in *Informal Criminal Justice* 26; Harris *As for Violent Crime That’s Our Daily Bread*.

⁸¹ Johnston (1996) *British Journal of Criminology* 228.

⁸² “Vigilantism and Popular Justice after Apartheid” in D Feenan (eds) *Informal Criminal Justice* (2003) 113.

⁸³ Johnston (1996) *British Journal of Criminology*.

⁸⁴ Martin (2010) *Acta Criminologica*.

⁸⁵ Dumsday (2009) *Southern Journal of Philosophy*.

⁸⁶ Rosenbaum & Sederberg *Vigilante Politics* 28.

vigilantism. As regards infringement of the interests of the community, it is likely that most vigilante “mobs” also make themselves guilty of public violence, which entails a number of people acting together in a manner that is serious enough to “forcibly disturb the public peace or security or to invade the rights of others”.⁸⁷ The thorny issue of whether vigilantes may undermine the authority of the state sufficiently to be guilty of crimes against the state such as treason or sedition is considered in § 3 4 1 below.

Vigilante incidents reported in recent newspaper articles confirm the violent nature of vigilantism, and include:

- The stoning and setting alight of a suspected witch in her uMlazi home;⁸⁸
- A large mob in Pietermaritzburg dragging robbery suspects out of their houses and attacking them with spades, hammers, sticks, pangas and spears. Their houses were then torched and the suspects were also set alight;⁸⁹
- A woman who was a local councillor from Ga-Rankuwa and two others assaulting a suspected rapist by kicking him all over his body and throwing him to the ground. He later died in hospital;⁹⁰
- A group of fifteen “vigilantes” from Acornhoek kidnapping six people suspected of being criminals, subjecting them to a “kangaroo court” and beating them;⁹¹
- Two women from Mpumalanga sjambokking a woman they suspected of having an affair with one of their husbands;⁹²
- One of two rape and murder suspects dying after sustaining serious injuries inflicted by three vigilantes in Komatipoort;⁹³

⁸⁷ Burchell *Principles* 755.

⁸⁸ N Barbeau “Man Pleads Not Guilty for uMlazi Murder” (2015-04-23) *IOL* <<http://www.iol.co.za/news/crime-courts/man-pleads-not-guilty-for-umlazi-murder-1.1849635#.VT0ISUWfyfR>> (2016-01-29).

⁸⁹ S Peters “MEC Shocked at Vigilantism” (2014-10-9) *IOL News* <http://www.iol.co.za/news/crime-courts/mec-shocked-at-vigilantism-1.1762906#.VQ_Ur0IwyfS> (2015-03-23).

⁹⁰ SAPA “Councillor in Court for 'Vigilante' killing” (2014-08-28) *IOL News* <http://www.iol.co.za/news/crime-courts/councillor-in-court-for-vigilante-killing-1.1742721#.VQ_WNkIwyfS> (2015-03-23).

⁹¹ SAPA “'Vigilantes' in Court for Kidnapping, Assault” *IOL News*.

⁹² SAPA “Sisters Sentenced for Assaulting 'Mistress'” (2014-06-26) *IOL News* <http://www.iol.co.za/news/crime-courts/sisters-sentenced-for-assaulting-mistress-1.1710056#.VQ_ZHEIwyfS> (2015-03-23).

- A rape, murder and robbery suspect being kicked and pummelled to death with the back of an axe by community members in Tonga, Mpumalanga;⁹⁴
- Community members killing a man by “necklacing” in Philippi;⁹⁵
- The home of an alleged drug-dealer being petrol-bombed and the owner being shot dead outside it in Grassy Park;⁹⁶ and
- Seven community members of Khayelitsha allegedly kidnaping, torturing and killing three men after they broke into the home of one of the members and stole a television set.⁹⁷

As is evident from this random sample of recent media reports, the majority of the acts described are very brutal, with often victims dying during the act of vigilantism, rather than afterwards. Harris suggests that vigilantes intend to kill – i.e., their main aim and object is to cause death, which is “built into the form that the vigilante act adopts”.⁹⁸ This is definitely true of killing methods such as “necklacing”.⁹⁹ At least in the (South) African context, it appears to be true that vigilante acts often involve excessively violent acts of – quite literal – “overkill”. The extremely violent nature of vigilante assaults even where death does not occur on the scene is borne out in a University of Stellenbosch study carried out between July and December 2012 at four health care centres in Khayelitsha, which compares the injuries sustained by those attacked by residents in vigilante incidents with those of victims of “ordinary” interpersonal violent attacks. The research found that the severity of injuries sustained by the 148 victims of “community assault” was substantially higher than those of other assault victims, and they were more

⁹³ SAPA “Mob Justice Trio to Remain Behind Bars” (2014-03-24) *IOL News* <http://www.iol.co.za/news/crime-courts/mob-justice-trio-to-remain-behind-bars-1.1665652#.VQ_dukIwyfS> (2015-03-23).

⁹⁴ SAPA “Three in Court for Mob Attack Video” *IOL News*.

⁹⁵ D Knoetze “Cape Man Dies in Necklacing” (10-06-2013) *IOL News* <http://www.iol.co.za/news/crime-courts/cape-man-dies-in-necklacing-1.1530009#.VQ_hQUIwyfR> (23-03-2015).

⁹⁶ D Knoetze “Alleged Drug Den Petrol-Bombed” (2013-07-31) *IOL News* <http://www.iol.co.za/news/crime-courts/alleged-drug-den-petrol-bombed-1.1555632#.VQ_iLUIwyfQ> (2015-03-15).

⁹⁷ J Otto “Vigilante Killing: Seven to Stand Trial” (2013-07-29) *IOL News* <http://www.iol.co.za/news/crime-courts/vigilante-killing-seven-to-stand-trial-1.1554177#.VQ_jNUIwyfR> (2015-03-15).

⁹⁸ Harris *As for Violent Crime That’s Our Daily Bread* 17.

⁹⁹ See chapter 1 n 18.

likely to suffer from “crush syndrome” as a result of blunt force such as the use of sjamboks.¹⁰⁰

It is clear from the above that while vigilante conduct may tangentially be aimed against property rights or other interests, the threatened infringement of its victims’ bodily integrity – and in many instances their right to life – seem to be typical features of vigilantism. As will be explained further, however, not all violence employed for the purposes of self-help is necessarily vigilantist in nature.¹⁰¹ The use or threat of such force may be formally state-sanctioned, and would therefore not qualify as vigilantism for the purposes of this study.¹⁰² Now that the prohibited conduct in which vigilantes engage has been examined, it is necessary to move on to an account of this unlawfulness aspect of vigilantism.

2 5 Unlawfulness

It is submitted that vigilantism is unlawful and non-state-sanctioned in at least three senses: First, the conduct perpetrated by vigilantes is illegal in the narrow sense in that it complies with the definitional elements of one or more crimes, as explained in § 2 3 above. Second, vigilantes’ “crime-fighting” efforts are themselves not sanctioned by the state. As will become clear, while the state does permit other forms of violent self-help, vigilantes’ particular brand of taking the law into their own hands is viewed as unjustified from the perspective of the formal criminal justice system. This is because it is deemed contrary to the legal convictions of the community (the *boni*

¹⁰⁰ S Forgas, W Delva, C Hauptfleisch, S Govender & J Blitz “Community v. Non-Community Assault Among Adults in Khayelitsha, Western Cape, South Africa: A Case Count and Comparison of Injury Severity” (2014) 104 (4) *SAMA* 299; S Fokazi “Vigilante Attacks 'More Severe'” (22-04-2014) <http://www.iol.co.za/news/crime-courts/vigilante-attacks-more-severe-1.1678851#.VQ_av0IwyfS> (23-03-2015).

¹⁰¹ *Contra* Johnston (1996) *British Journal of Criminology* 228, who appears to assume that force employed solely for defensive purposes amounts to vigilantism, thus failing to distinguish sufficiently between (justified and legitimate) private defence and vigilantism.

¹⁰² This reference to “formal” state sanctioning refers to the official state legal position. It does not imply, however, that “informal” state sanctioning does not take place. Even though some state agents such as police officers may – and do – turn a blind eye or even actively approve of particular acts of vigilantism, examples of which are discussed in § 7 3 2 below, if conduct exceeds the bounds of what is justified in terms of the law it is unlawful (officially non-state sanctioned).

mores), and it is therefore also unlawful in this wider sense. A third sense in which vigilantes act illegally relates to vigilantism's "extra-legal" quality: vigilantes do not play by the state's rules or regard themselves as willingly accountable to the state.¹⁰³ The latter two aspects (relating to vigilantism's unjustifiability and extra-legal nature) are explored further below.

2 5 1 Vigilantism as *contra bonos mores*: vigilantism v private defence

As already mentioned, vigilantes (rightly or wrongly) regard the state as not having fulfilled its positive obligation to protect citizens from all forms of violence.¹⁰⁴ Their response is to appropriate certain law-enforcement responsibilities and crime-fighting powers for themselves. The characterisation of violence as being "an effort to do justice or undo an injustice"¹⁰⁵ is thus particularly apposite in the instance of vigilantism. Though vigilantes may view their conduct as justified, rather than as simply a private criminal activity, it is clear that this opinion is not shared by the state. As mentioned above,¹⁰⁶ in various court cases, taking the law into one's own hands in general, and vigilantism in particular, have been depicted as "a serious threat ... to the very fabric of society as we know it";¹⁰⁷ as potentially violating human rights;¹⁰⁸ as undermining the due process of law;¹⁰⁹ and even as promoting anarchy.¹¹⁰ The state's obvious reluctance to accord vigilante acts even a measure of legitimacy is striking, especially since the state *is* theoretically prepared to allow citizens to "fill the void" in instances where the state itself is unable (or unwilling) to fulfil its responsibility by effectively responding to a public demand for order and security.¹¹¹ If it is not possible for the state, through the police and courts, to provide citizens with protection

¹⁰³ Dumsday (2009) *Southern Journal of Philosophy* 53.

¹⁰⁴ S 12(1)(c) of the Constitution of the Republic of South Africa, 1996. See also Malan (2007) *Tydskrif vir die Suid-Afrikaanse Reg* and §§ 1 2 4 above and 3 5 2 2 below.

¹⁰⁵ H Zehr "Evaluation and Restorative Justice Principles" in E Elliot and R M Gordon (eds) *New Directions In Restorative Justice: Issues, Practice, Evaluation* (2005) 298.

¹⁰⁶ At § 2 3.

¹⁰⁷ *S v Schrich* 370D.

¹⁰⁸ *S v Hena and another* 2006 2 SACR 33 (SE) 40A-E; *Zuko v S* para 19.

¹⁰⁹ *Jansen v S*; *Lesapo v North West Agricultural Bank*.

¹¹⁰ *S v Kleinbooi* 2012 JDR 1623 (ECB); *Jansen v S*; *Lesapo v North West Agricultural Bank*.

¹¹¹ M R Enion "Constitutional Limits on Private Policing and the State's Allocation of Force" (2009) 59 *Duke Law Journal* 519.

where it is urgently and immediately required, it has long been acknowledged¹¹² that individuals have an “inherent right” to resort to self-help by taking the law into their own hands. Acting in private defence¹¹³ to repel an unlawful attack upon a legally-protected interest is justified according to the legal convictions of the community on the grounds that the “defender” temporarily acts on behalf of the state to uphold the law.¹¹⁴

But why is the state prepared to delegate the use of force to private citizens in certain defined circumstances and not in others? Private defence and vigilantism are two forms of self-help that may at first appear to be very similar. The former is a complete legal defence¹¹⁵ permitting the use of reasonable and necessary – even deadly – force to ward off an attack. It could be argued that vigilantes should therefore be entitled to rely on this ground of justification. After all, their actions are frequently driven by a “fervent belief in the capacity of counterviolence to, well, counter violence”.¹¹⁶ Why is the state willing to bestow legitimacy on the conduct of an individual resorting to self-help in private defence, but not on acts of vigilantism? To answer this question, the requirements of private defence must be applied to the vigilante scenario to establish the extent to which vigilante conduct may be massaged to fit into the private defence mould. The aim is to clarify why the actions of vigilantes are regarded as *contra bonos mores* instead of as justified private defence by the criminal justice system. The main requirements for private defence examined below are that the attack that is ward off must be unlawful, imminent or commenced and must be upon a legally protected interest; and that the defensive conduct resorted to must be necessary, reasonable and directed against the attacker.

¹¹² See Snyman *Criminal Law* 102-103; Burchell *Principles* 117; Malan (2007) *Tydskrif vir die Suid-Afrikaanse Reg*.

¹¹³ The term “private defence” is preferred to “self-defence”, since this ground of justification may also be raised where an identifiable third party’s interests are being defended.

¹¹⁴ J Burchell *South African Criminal Law and Procedure: General Principles of Criminal Law* 4 (2011) 121; C Snyman *Criminal Law* (2008) 103.

¹¹⁵ I.e., the accused is acquitted if the defence is raised successfully, since their conduct is deemed justified and therefore not unlawful.

¹¹⁶ J L Comaroff & J Comaroff “Popular Justice in the New South Africa: Policing the Boundaries of Freedom” in T R Tyler (eds) *Legitimacy and Criminal Justice: International Perspectives* (2007) 223.

2 5 1 1 Attack requirements

2 5 1 1 1 Actual unlawful attack

The first requirement for private defence is that it must be *in response to an actual unlawful attack*. On one level it is clear that vigilantism is indeed a reaction to real or perceived deviance,¹¹⁷ an attempt to punish or hold a particular alleged wrongdoer accountable.¹¹⁸ The examples of vigilante violence mentioned earlier¹¹⁹ were all preceded by apparent transgressions ranging from drug-dealing, adultery and witchcraft to theft, murder and robbery which posed a real or perceived threat to community security, and the perpetrators of such acts were the targets of the subsequent vigilante violence.

In respect of this normative aspect of vigilantism¹²⁰ – that vigilantism is often a “moralistic response to deviant behavior”¹²¹ – it is apparent that vigilantes do not confine themselves to policing criminal wrongs. Buur and Jensen are of the view that the concept of crime used by vigilantes is “profoundly polyvalent”:¹²² Vigilantes aim at purging the community of all “activities contrary to particular dominant groups’ version of morality”, whether or not these are defined as criminal by the state. In his definition of vigilantism, Johnston recognises the fact that deviance as defined by vigilantes may not necessarily correspond in all respects with state-defined crimes: vigilantism may be directed at social or communal control, rather than crime control.¹²³ To encompass this insight, he concludes that “vigilantism may be said to arise when some established order is under threat from the transgression, potential transgression or the imputed transgression of

¹¹⁷ Johnston (1996) *British Journal of Criminology* 230; R Monaghan “‘One Merchant One Bullet’: The Rise and Fall of PAGAD” (2004) 12 (1) *Low Intensity Conflict and Law Enforcement* 1 14.

¹¹⁸ Senechal De La Roche (1996) *Sociological Forum* 103. See also §§ 2 5 1 2 3 and 2 6 3 1 below.

¹¹⁹ At § 2 4 2 above.

¹²⁰ Johnston (1996) *British Journal of Criminology* 229.

¹²¹ Senechal De La Roche (1996) *Sociological Forum* 98. On the moralistic nature of vigilantism and self-help, see also Black “Crime as Social Control” in *Towards a General Theory of Social Control Volume 2: Selected Problems* 1 and Abrahams *Vigilant Citizens* 79.

¹²² Buur & Jensen (2004) *African Studies* 147. See also Buur (2006) *Development and Change* 754.

¹²³ Johnston (1996) *British Journal of Criminology* 228.

institutionalized norms".¹²⁴ Dumsday¹²⁵ argues that vigilantes need not even necessarily be upholding established norms or aiming to address perceived threats to the *status quo*, as asserted *inter alia* by Johnston,¹²⁶ Abrahams¹²⁷ and Rosenbaum and Sederberg.¹²⁸ His view is that vigilantism merely requires:

“a concern on the part of the vigilante for what he or she sees as justice or the good of society, whether those values pertain to the attempted enforcement of positive law, natural law, societal custom, or all three. The aim of the vigilante need not include the upholding or reforming of any established order, legal or otherwise”.¹²⁹

He goes so far as to say that a vigilante may even defend a system of values unique to themselves, provided the value defended is upheld as a norm by the wider society.¹³⁰ While Dumsday's point that vigilantes need not uphold the established order only is well made, it is uncertain what he means by “wider society”; would a belief that is upheld by a particular small minority group, even if not espoused by the majority, suffice?

The above makes it clear that vigilantism may be a response to a normative breach that is not unlawful from a legal perspective. It is evident that some of the “attacks” to which vigilantes responded mentioned above – most obviously adultery and witchcraft – would not qualify as “unlawful”, since such conduct is not prohibited by law. The implication is that the first hurdle – that private defence must be a response to an actual unlawful attack – would not be met in such cases. State non-recognition of the existence of “culturally diverse conceptions of crime”¹³¹ for the purposes of private defence is

¹²⁴ 230.

¹²⁵ Dumsday (2009) *Southern Journal of Philosophy* 55-56.

¹²⁶ Johnston (1996) *British Journal of Criminology* 230.

¹²⁷ Abrahams *Vigilant Citizens* 16.

¹²⁸ Rosenbaum & Sederberg *Vigilante Politics* 4.

¹²⁹ See also D Nina “*Dirty Harry* is Back: Vigilantism in South Africa - The (Re)emergence of 'Good' and 'Bad' Community” (2000) 9 (1) *African Security Review* 18 21, who suggests that “vigilantism will invoke an ‘imagined order’ that either existed in the past (in its decadent mode), or never existed but is desired (in its idealised mode).”

¹³⁰ Dumsday (2009) *Southern Journal of Philosophy* 56.

¹³¹ Johnston (1996) *British Journal of Criminology* 228.

unfortunate from the standpoint of the vigilante. In the context of anti-witchcraft vigilantism, for instance, it is extremely doubtful whether a spiritual attack, such as being cursed by a witch, would be classified as an actual, unlawful one for private defence purposes. Although those victimised by supernatural attacks may perceive no meaningful distinction between “ordinary” criminal violence and witchcraft, since both cause them harm and thus form “part of the same moral universe of evil”,¹³² the point of departure in South African law is to deny the existence of witchcraft.¹³³ From a legal perspective, therefore, a perceived metaphysical attack emanating from a witch would not be equated with an actual physical one;¹³⁴ furthermore, fear alone is insufficient to justify acting in private defence, and there would thus be no ground of justification available to the anti-witchcraft vigilante.¹³⁵

Notwithstanding the non-criminal nature of some of the “attacks” to which vigilantes respond, a more radical speculation is that vigilante conduct is a response to an unlawful attack in another sense. Is it not possible to argue that the very state inaction that is the catalyst for vigilantism¹³⁶ is in itself an unlawful attack taking the form of an omission, or failure to act? There is without doubt a positive obligation on the state to protect citizens from violent crime, a duty that has been affirmed in the context of the law of delict in *Carmichele v Minister of Safety and Security*¹³⁷ as well as subsequent cases.¹³⁸ But is the failure to comply with this legal duty necessarily a blameworthy one in the criminal law sense? According to Martin,¹³⁹ it is. He

¹³² S Jensen & L Buur “Everyday Policing and the Occult: Notions of Witchcraft, Crime and ‘The People’” (2004) 63 (2) *African Studies* 193 206.

¹³³ See H Ludsin “Cultural Denial: What South Africa’s Treatment of Witchcraft Says for the Future of its Customary Law” (2003) 21 (1) *Berkeley Journal of International Law* 62 108 and M Nel “Violent Enforcement of Traditional Beliefs: Witchcraft, Vigilantism and State Legitimacy” (2014) 27 (2) *Acta Criminologica* 25 28.

¹³⁴ Needless to say, as soon as there is a physical manifestation of witchcraft that amounts to an infringement of rights – for example, if the suspected witch administers poison to their victim, infringing the victim’s right to bodily integrity – the requirement of an actual attack that violates a legally-protected interest would be met.

¹³⁵ Burchell *Principles* 118. The related question of whether occult attacks are aimed against interests deemed worthy of legal protection is considered below at § 2 5 1 1 3.

¹³⁶ See § 4 2 5 for more details.

¹³⁷ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 62.

¹³⁸ See *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Minister of Safety and Security v Van Eeden (Women’s Legal Centre Trust, as Amicus Curiae)* 2003 1 SA 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA).

¹³⁹ Martin (2012) *State Crime*.

argues that the South African state and its agents, the police, are indeed guilty of state crimes of omission in that they have neglected their responsibility to provide order and security to those most in need of it. Rodgers goes even further, noting in the Nicaraguan context that state violence “operates in a way that is heuristically comparable to the governmentality of ... gang violence”. Both gangs and the state have “become [loci] for parochial elite interests, who have captured the state apparatus and are promoting an exclusive social order based on the violent separation of ... society into ‘valid’ and ‘invalid’ population groups.”¹⁴⁰ Although the conception of the state as gang is somewhat extreme, the insight that society is separated into those for whom state security provision is available and those who are excluded from it is in line with Martin’s insight that the state is neglecting its responsibility towards a large proportion of marginalised individuals and communities. While vigilantes may certainly be mobilised “in defence of successful community members”,¹⁴¹ vigilantes themselves are almost without exception the marginalised, those whose interests the state does not protect effectively, if at all. In the context of vigilantism aimed at non-criminal deviance it may be argued that formal avenues of redress are essentially irrelevant¹⁴² in any event.

In concluding that vigilantism is a response to state crime Martin draws on Green and Ward,¹⁴³ who conceptualise state crime as having two elements, namely human rights violation and organisational deviance. As regards the human rights violation requirement, Martin¹⁴⁴ contends that the most serious and pertinent human rights infringement that engenders vigilantism is the state’s breach of the right to equality. Section 9(1) of the Constitution states: “Everyone is equal before the law and has the right to

¹⁴⁰ D Rodgers “The State as a Gang: Conceptualizing the Governmentality of Violence in Contemporary Nicaragua” (2006) 26 (3) *Critique of Anthropology* 315 326.

¹⁴¹ Buur (2003) *Anthropology and Humanism* 25. See, e.g., 30-32 for a case where a seemingly middle-class man (he owned brick-making machines and a car) approached the *Amadlozi* vigilante group for assistance in tracking down the person who had stolen his machines. Despite his relatively wealthy status, he had asked the *Amadlozi* for help because the police investigation had yielded no results.

¹⁴² Rosenbaum & Sederberg *Vigilante Politics* 12-13.

¹⁴³ P J Green & T Ward “State Crime, Human Rights, and the Limits of Criminology” (2000) 27 (1) *Social Justice* 101.

¹⁴⁴ Martin (2012) *State Crime*.

equal protection and benefit of the law.” The state violates this right through its unequal provision of criminal justice services, since there is an effective absence of state police in indigent, crime-prone neighbourhoods.¹⁴⁵ Buur notes:

“[T]he townships have become spaces of exception; spaces in which the law is, if not completely suspended, then, at least, enforced primarily by local justice structures that are governed by values and practices other than human rights and due process”.¹⁴⁶

As is elaborated on in § 4 2 2, in this literal and/or figurative “no go area”, where the effectiveness of state power in controlling crime is diluted due to unwillingness and difficulty of access combined with community alienation, tension and hostility,¹⁴⁷ state guarantees of collective security and social order are no more than illusory.

In respect of the organisational deviance element of state crime, Green and Ward¹⁴⁸ assert that deviant conduct (which for present purposes is the incompetent, discriminatory and corrupt provision of criminal justice services)¹⁴⁹ must not only be illegitimate, but must also be labelled as such. Interestingly, their view is that deviancy labels may be applied “from below”, implying that popular delegitimation of the state¹⁵⁰ may be a symptom of organisational deviance. By temporarily usurping state power to fill the policing vacuum left by the state’s seeming inability to preserve a satisfactory level of social order and collective security, vigilante violence is in this sense a demonstration of significant loss of state legitimacy, and thus an indicator of organisational deviance.

From this perspective, then, vigilantism may be regarded “as much a form of resistance to state crime as ... a defensive reaction against

¹⁴⁵ 218.

¹⁴⁶ Buur (2003) *Anthropology and Humanism* 35.

¹⁴⁷ Abrahams *Vigilant Citizens*.

¹⁴⁸ Green & Ward (2000) *Social Justice*.

¹⁴⁹ See from § 4 2 5 below for more.

¹⁵⁰ See § 3 6 below for more.

conventional offending”.¹⁵¹ The argument has its appeal, since it correctly concentrates on the underlying causes of vigilante violence rather than focusing merely on its surface manifestations. In so doing, it allows for the possibility of extending private defence to cover instances of vigilante violence that would otherwise not have been regarded as a reaction to an “actual” attack. However, even if this line of reasoning is cogent to a degree, for reasons that will become apparent, it does not necessarily follow that vigilante conduct may be equated with private defence merely because it is carried out in response to state crime. That the “actual attack” requirement is complied with is only the first step in determining whether it is possible for (some) vigilantism to be justified as private defence.

2.5.1.1.2 Attack commenced or imminent

A second private defence requirement relating to the attack is that it *must have commenced or be imminent*. If the response to the unlawful attack is retaliatory or pre-emptive, it cannot be justified. This requirement is often problematic in the vigilante context. Some authors¹⁵² would appear to exclude all vigilantism as unjustified on the basis of this “immediate response” requirement. In this vein, Johnston argues that vigilantism entails at least minimal planning and organisation in order to avoid reducing the term to “mere reactive violence” and so rendering it meaningless.¹⁵³ Dumsday agrees with Johnston, implying that the “altruistic” situation where people apprehend a criminal and mete out punishment is not vigilantism because “[a]n angry overreaction does not make one a vigilante”; he submits that only where “altruistic vigilantes” are patrolling and on the lookout for crimes to stop would their punishing the criminal amount to vigilantism. Dumsday is surely mistaken: his example falls squarely within what may be classed as vigilantism. While all reactive violence is not vigilantism, characterising

¹⁵¹ Martin (2012) *State Crime* 231.

¹⁵² Johnston (1996) *British Journal of Criminology* 222; Dumsday (2009) *Southern Journal of Philosophy* 51.

¹⁵³ Johnston (1996) *British Journal of Criminology* 222.

vigilantism as a form of reactive violence, as does Black,¹⁵⁴ is not incorrect *per se*. It is submitted that it is not the (over-)reactive or spontaneous nature of conduct that determines whether it is vigilantism, but rather whether or not such conduct is formally state-sanctioned. For this reason Johnston's regrettable conflation of private defence and vigilantism is particularly problematic. It leads him not only to conclude that some vigilante violence may be lawful, but also obliges him to argue that a measure of planning, premeditation or organisation is inherent in vigilantism so that he can distinguish it from private defence, which necessarily entails an immediate response. In this manner he attempts to "explain away" such dubious "vigilante" examples as the acquittal of a man defending himself against armed assailants on the basis that the response is immediate instead of premeditated, and so does not qualify as vigilantism.¹⁵⁵ However, the reason the man defending himself against armed assailants is not a vigilante is not due to the spontaneous nature of his reaction, but rather because his response is not unlawful, being condoned by law as a manifestation of private defence. Johnston's line of reasoning for making preparatory activity a requirement for vigilantism is unconvincing overall, in particular his torturous contention that spontaneous group vigilantism is nevertheless premeditated in the sense that particular social conditions predispose participants to engage in it.¹⁵⁶ Martin rightly criticises Johnston's blurring of the boundaries between "situational predisposition and the process of premeditation", transforming premeditation from an "act of conscious deliberation to an endemic, socially conditioned reflex".¹⁵⁷

In relation to whether vigilantism should be defined as organised collective violence or not, Senechal De La Roche also excludes what she terms "lynching" from the category of vigilantism on the basis that the former is much more disorganised and temporary, whereas the latter has "the capacity for sustained collective action".¹⁵⁸ Since the fluid and informal nature

¹⁵⁴ Black "Crime as Social Control" in *Towards a General Theory of Social Control Volume 2: Selected Problems*.

¹⁵⁵ Johnston (1996) *British Journal of Criminology* 222.

¹⁵⁶ 222.

¹⁵⁷ Martin (2010) *Acta Criminologica* 57.

¹⁵⁸ Senechal De La Roche (1996) *Sociological Forum* 104-105.

of even the most highly organised vigilante groups has already been noted, contrasting vigilantism with lynching in this way does not appear to be particularly helpful. By overlooking vigilante groups' common underlying motivation and focusing instead on their supposedly differing degrees of organisation, Senechal De La Roche's differentiating between lynching and vigilantism contributes very little to the present quest to define vigilantism in a distinctively legal way. Whether organised or disorganised, *why* vigilantes do what they do is what sets them apart from other perpetrators of collective violence. For this reason, despite a measure of group mobilisation being a regular feature of much *ad hoc* as well as recurrent collective vigilantism, organisation, unless used in Johnston's wide sense of planning so minimal or far-removed from the vigilante act itself as to be almost meaningless, is not a necessary element of vigilantism. For present purposes, therefore, no distinction will be drawn between spontaneous, unorganised vigilantism ("lynching") and its more planned and premeditated manifestations. They share so many common features that any attempt to tell them apart amounts to a distinction without a difference.

Rejecting Johnston's requirement that vigilantism must be planned, organised and premeditated implies that vigilantism may indeed be spontaneous and immediate, meted out to those who are busy perpetrating criminal acts, or are imminently about to do so. There may thus be vigilante scenarios where the immediate response private defence requirement is complied with. However, it must be acknowledged that vigilantes do often "punish" as a warning against future deviance, or exact vengeance for an attack that has already terminated, making their conduct pre-emptive or retaliatory rather than defensive in nature. There are two counter-arguments to this. First, many vigilante actions, such as those aimed against drug dealers or habitual thieves, may be viewed as a response to an inevitable future "attack" that forms part of a cycle of "violence" or "criminality". It was acknowledged in *S v Engelbrecht*¹⁵⁹ in the context of domestic violence that where an attack is "imminent, pending, hanging over [one's] head, threatening, ready to befall [one], foreseeable, and inevitable", it is permissible

¹⁵⁹ *S v Engelbrecht* 2005 2 SACR 41 (W) para 396.

to act in private defence against it in the interlude between violent or cruel episodes¹⁶⁰ provided the other private defence requirements have been met. While this is not an appeal court decision, the reasoning is persuasive, and its basic premise could be extended by analogy to the vigilante scenario. Second, if the argument advanced previously about vigilantism being a response to a passive state “attack” is convincing, the unlawful attack responded to is wider than simply the immediate actions of a particular social deviant. State failure itself could be characterised as a continuous source of rights-infringement against which vigilantes are entitled to defend themselves and others.

Overall, then, while the requirement that the unlawful attack that is warded off must be actually happening or immediately threatening for private defence to succeed does not automatically exclude all vigilante action from its ambit, it must be conceded that much vigilante conduct fulfils this condition loosely at best.

2 5 1 1 3 Attack against legally-protected interests

A third requirement is that private defence may be invoked only where the *legally protected interests of the defender or of third parties* are being infringed by an unlawful attack. Such third parties need not have in any sort of special protective duty towards or relationship with the defender. However, Burchell regards vigilantes’ claims to be acting to uphold the interests of the community at large, as opposed to those of particular individuals, to be a point of distinction between vigilantism and private defence. He is of the view that it cannot be lawful to attack “persons or organisations thought to be a danger to society [at large]”.¹⁶¹ The validity of this distinction is questionable. In most instances, vigilantism occurs in response to acts of crime or social deviance that do have identifiable victims, and its immediate aim is to target those responsible for causing such individual harm. Also, in light of what has

¹⁶⁰ Para 389.

¹⁶¹ Burchell *Principles* 120.

already been said concerning an expanded definition of “unlawful attack”, it is possible to argue that each participant in an act of vigilantism has rights and interests that are personally being violated/attacked on an ongoing basis by state inaction in the face of crime. Thus there is the sense that vigilantes are defending their own underlying interests, as well as those of whichever third party on whose behalf they profess to be acting in the moment.

What is admittedly problematic as regards the requirement of a legally-protected interest is the phenomenon of vigilante acts in response to forms of non-criminal deviance. Using once again the example of a witchcraft “attack”: since the state does not deem the right to be free from occult violence – from “supernatural death”¹⁶² – to be an interest recognised and protected by law, this “right” is unenforceable. Victims of witchcraft violence are therefore in a no-win situation. Faced with state apathy, their only option to safeguard themselves against the (perceived) metaphysical attack of witches who secretly use supernatural powers to cause immediate harm is to resort to self-help. However, for the same reason that the state will not protect their interests in such an instance – because the interest concerned is not regarded as worthy of legal recognition – such self-help would also not be justified as private defence.¹⁶³ The same would apply to vigilante violence in response to adultery and other non-criminal wrongs: the perpetrator has essentially been left without a legal remedy, and the only options available to uphold their interests are extra-legal ones. Pointing this out is certainly not meant to imply that adulterers or witches deserve violent punishment, but merely to draw attention to the dilemma faced by those who do hold such beliefs.

¹⁶² *S v Mokonto* 1971 2 SA 319 (A) 324C.

¹⁶³ Nel (2014) *Acta Criminologica* 36. See also SAPA “Mamelodi Dad Convicted for Killing Family” (2013-10-21) *News24* <<http://www.news24.com/SouthAfrica/News/Mamelodi-dad-convicted-for-killing-family-20131021>> (2015-03-25) for an example of where reliance on private defence was rejected out of hand in the case of a man who killed his wife, claiming that she was a witch-turned-snake who had attacked him and his two daughters.

2 5 1 2 Defence requirements

2 5 1 2 1 Necessary

As regards the private defence requirements relating to the defensive conduct, the first one is that the conduct must be *necessary*. The obvious issue pertinent to an inquiry into vigilante methods is why they choose to take the law into their own hands rather than exhausting the formal crime-fighting channels available to them. First, it must be noted that while the defensive conduct must be necessary, this does not mean that private defence may be utilised only as an absolute last resort. There are, for instance, numerous reported cases of private defence succeeding as a ground of justification despite the accused not having attempted to phone the police before warding off an unlawful attack, even though there was the opportunity to do so.¹⁶⁴ According to *S v Engelbrecht*, private defence will only fail where the “legal system, the South African Police Service and society [are not afforded] a *fair* chance of helping” someone wishing to rely on the defence.¹⁶⁵ As is elaborated on chapter 4, there is considerable evidence that vigilantism is not resorted to lightly, but is perpetrated *in extremis* chiefly by those who have been repeatedly let down by the state to the extent that they perceive self-help to be the only option that remains open to them. Taking into account the dysfunctionality of formal justice options in environments where vigilantism is most prevalent, this necessity requirement could doubtless be met in many instances of *bona fide* vigilantism. As will be demonstrated in due course,¹⁶⁶ the vigilante perception that the formal criminal justice system will offer them little assistance is probably understandable – and justified – in the South African context.

¹⁶⁴ E.g. *S v T* 1986 2 SA 112 (O), where a 16-year-old schoolboy was acquitted of murdering a bully on the basis of private defence, despite not even considering the option of contacting the police for assistance. See also *S v Joshua*, where the accused successfully argued that he acted in private defence on one of the counts of murder despite making no attempt to resort to official channels before seeking out and killing those who had robbed his wife of her possessions.

¹⁶⁵ *S v Engelbrecht* para 418 (emphasis added).

¹⁶⁶ See chapter 4 below.

2 5 1 2 2 Reasonable

A real difficulty with fitting vigilantism into the private defence mould relates to the requirement that the defensive conduct must be objectively *reasonable*. Although proportionality between attack and defence is not an absolute requirement, it is in the public interest that there be a measure of proportionality between the seriousness of the attack and the manner and extent of the defence, “lest private defence degenerate into private vengeance”.¹⁶⁷ It must be emphasised that lethal force *is* permissible in private defence, even to protect interests of a lesser value than life.¹⁶⁸ It is not necessarily the fact that vigilantes assault or kill which is problematic, but the exceptionally violent way that their victims are tortured or meet their deaths. Vigilante violence frequently goes far beyond what is required simply to ward off the unlawful attack, and thus exceeds the bounds of private defence. Some of the reasons for this “overkill” are detailed in subsequent chapters.¹⁶⁹ Suffice it to say that what is euphemistically referred to as the “African manner”¹⁷⁰ of justice on the website of *Mapogo A Mathamaga*, a large vigilante *cum* private security organisation, may entail stoning, “necklacing”, sjambokking and other brutal methods of retaliation that are not compatible with the ideal of human rights, to say the least. In advertising their crime-fighting services, *Mapogo* states:

“People who are found in possession of our customer’s goods do not have the luxury of long-lasting court cases and being found

¹⁶⁷ Burchell *Principles* 124.

¹⁶⁸ See, for instance, the controversial case of *Ex Parte die Minister van Justisie: In Re S v Van Wyk* 1967 1 SA 488 (A), where private defence succeeded in the case of a man who set up a shotgun trap that shot and killed a thief who broke into his shop to steal at night. His protection of property interests by means of lethal force was deemed reasonable and necessary in the (exceptional) circumstances of that case.

¹⁶⁹ See, e.g., §§ 4 3 2 4 and 5 2 1 2 below for more on the significance of corporal punishment.

¹⁷⁰ An article cited as part of the “In the Press” section of the *Mapogo* website quotes its founder, Monhle John Magolego, as approving of corporal punishment as the “African way”: “I am a firm believer in corporal punishment, and if a young man has been naughty his buttocks must be exposed so that he can be sjambokked as a genuine punishment and deterrent.” (Anonymous “Embattled *Mapogo* Moves into the Mainstream” *Mapogo A Mathamaga* <<http://mapogoafrica.co.za/?p=65>> (2015-03-25).

innocent on a technical point. They will immediately be dealt with in a traditional way”.¹⁷¹

This extract hints not only at the threat of violence implicit in vigilante conduct, but also at its grossly disproportionate nature.¹⁷² In addition, it alludes to the antagonistic attitude of advocates of vigilantism towards the formal criminal justice process, which must always take the human rights of the individual into account.¹⁷³ The routine utilisation of exceptionally brutal methods is a crucial point of distinction between private defence and vigilantism, and is an important – and well-justified – reason why the condoning and legitimisation of the majority of vigilante actions by legal authorities is unlikely to be forthcoming.

2.5.1.2.3 Directed against the unlawful attacker

The last requirement for private defence is that it must be *directed against the unlawful attacker*. While there are certainly accounts of innocent people becoming victims of vigilante violence, going after innocents is not vigilantes’ objective; indeed, their main aim is to target attackers – or at least, perceived deviants – and not to subject uninvolved members of the alleged wrongdoer’s group or social category to punishment or social control.¹⁷⁴ Taking what has been said above about the unlawful attack into account, it may be argued that vigilantism is aimed against the unlawful attacker in a dual sense – the immediate violence is aimed at the socially deviant perpetrator of the positive attack, but it is also directed against the state – a violent and

¹⁷¹ Anonymous “Mapogo A Mathamaga” *Mapogo A Mathamaga* <<http://mapogoafrica.co.za>> (2015-03-25)

¹⁷² Theft (that infringes the right to property) is weighed up against assault with intent to cause grievous bodily harm by sjambokking (that violates the right to bodily integrity, and potentially even the right to life).

¹⁷³ For more on this aspect, see § 4.3.2.5 below.

¹⁷⁴ This distinguishes it from rioting and terrorism – see Senechal De La Roche (1996) *Sociological Forum* 103.

symbolic demonstration of state delegitimation¹⁷⁵ to ward off the state crime of failure to protect the community from positive acts of violence.¹⁷⁶

2 5 1 2 4 Awareness that action is in private defence

Snyman proposes an additional requirement for private defence, namely that it entails the actor *being aware that they are acting in private defence*.¹⁷⁷ Vigilantes certainly share the same sense of moral righteousness as a true actor in private defence would profess to possess – even more so, perhaps, since when warding off a deviant attack in the only way they deem possible, vigilantes frequently claim to be acting to protect the interests of individuals in the wider community, and not merely their own. In this regard, Abrahams notes that vigilantes “typically lay claim to the moral high ground as the guardians of society”.¹⁷⁸

However, maybe the requirement that there be conscious acknowledgement that what is being done is simply to repel an attack in circumstances where state agents are unable to do so, is at the heart of why vigilantism cannot truly be equated with private defence. While it is perfectly possible to construct a hypothetical vigilante scenario that nominally complies with all the other requirements for private defence outlined above, the motivation for vigilante violence invariably goes beyond the mere warding off of a single unlawful attack. That their self-help conduct may in practice correspond with that of an individual acting in private defence should not be viewed as an indication that vigilantes view themselves as acting within the legal parameters laid down by the state. As will be shown in § 3 6, far from simply entailing the fleeting appropriation of state power so as to assist

¹⁷⁵ See especially § 3 6 below.

¹⁷⁶ For more on how the state may be conceived of as committing a crime of omission by not adequately protecting its citizens in line with its legal duty to do so, see the discussion of Martin (2012) *State Crime* and Rodgers (2006) *Critique of Anthropology* above at § 2 5 1 1 1.

¹⁷⁷ Snyman *Criminal Law* 111.

¹⁷⁸ Abrahams *Vigilant Citizens* 79.

temporarily in upholding the legal order, as is the case for private defence,¹⁷⁹ vigilante violence demonstrates an active undermining of such state authority.

2 5 1 2 5 Concluding remarks regarding the distinction between vigilantism and private defence

In conclusion, although acts of valid private defence are sometimes classified as vigilantism, this study's scope is confined to vigilante actions that exceed the bounds of lawful private defence. Failing to distinguish between the two is problematic in the quest to conceptualise vigilantism as conduct that is *criminal* and at variance with the legal convictions of the community. As explained above, while vigilantism *prima facie* has much in common with private defence, these superficial similarities belie a crucial distinction between the two based on why they do what they do. As is detailed further at § 2 6 3, when the motives for vigilantism are considered, vigilantes' aim is certainly not merely to uphold the law temporarily on behalf of the state.¹⁸⁰ While vigilantes might believe their conduct to be morally justified, they are fully aware that their conduct is not formally state-sanctioned. This wilful refusal to play by the state's rules – one of the features characterising vigilantism as a *criminal* act – is now considered in more depth.

2 5 2 Vigilantism as extra-legal/illegal

There are various ways to conceptualise the nature of the relationship between vigilantes and the state. The first perspective – championed by Johnston – is that “[i]llegal and extra-legal action are not ... preconditions of vigilantism.”¹⁸¹ Indeed, he is of the view that vigilantes “may work

¹⁷⁹ Snyman *Criminal Law* 102.

¹⁸⁰ For this reason, too, vigilantes would also be unable to rely on putative private defence excluding fault. See § 2 6 2 below for more.

¹⁸¹ Johnston (1996) *British Journal of Criminology* 233. See also D Sharp, S Atherton & K Williams “Civilian Policing, Legitimacy and Vigilantism: Findings From Three Case Studies in England and Wales” (2008) 18 (3) *Policing and Society* 245 248-249, who opine that “vigilantism ... can receive an implied legitimacy by those in authority, that is, the police.”

harmoniously with and within the state”¹⁸² – an argument he is able to advance because he places little emphasis on vigilantes threatening or using actual force to achieve their ends. Although Johnston accepts that the (potential) use of force is a requirement for vigilantism, he waters down this requirement to the point that it serves little function. As mentioned earlier, not only does he include within its ambit (presumably lawful) force employed for purely defensive purposes, but he also emphasises that “even where self-help groups enjoy a potential to exercise or threaten force that potential may not, in itself, be unlawful”.¹⁸³ This statement can only be understood within a context where actual force is either not resorted to at all or used purely defensively within the narrow bounds of private defence, since in other instances its exercise would, indeed, be contrary to law. In a seemingly contradictory fashion, however, Johnston contrasts the conduct of self-protection agents or groups located within the broad framework of community crime-prevention (such as neighbourhood watch groups, citizen patrols and private security guards) with that of vigilantes. The former, which he terms “responsible citizenship” is “within the legal ambit of the state”. It is often sponsored and officially sanctioned by the formal criminal justice system and its agents, and supplements state functions in the policing sphere.¹⁸⁴ The latter, which he labels “autonomous citizenship”, is self-help engaged in by private voluntary agents without state authority or support:¹⁸⁵ instead of supplementing the state, such active citizens act as state substitutes. It is unclear whether Johnston’s understanding of state support entails only active support – overt official state approval – or whether passive unofficial support – those instances where specific state agents implicitly condone the actions of vigilantes – could also be included.

How can Johnston state that vigilantism is not necessarily illegal conduct, while also contending that it occurs without state approval? He makes no attempt to explain why the state might want to withhold support from crime-fighting initiatives that are not illegal. Perhaps in order to explain

¹⁸² Martin (2010) *Acta Criminologica* 57.

¹⁸³ Johnston (1996) *British Journal of Criminology* 233.

¹⁸⁴ 225; L Johnston *The Rebirth of Private Policing* (1992).

¹⁸⁵ Johnston (1996) *British Journal of Criminology* 226.

this apparent paradox, Dumsday deconstructs the Johnston “lack of state approval” requirement by focusing on the mindset of vigilantes themselves, rather than the attitude of the state towards them. He maintains that vigilante “autonomy” in this context refers not to a lack of permission by the state, but rather to a lack of a mindset of accountability by the vigilante; vigilantes are not willingly accountable for their violent actions in the sense that they do not take orders from the state or subject themselves to state reprimand (although of course they may be reprimanded – punished – and thus held accountable by the state despite having this attitude). They simply do not care what the state thinks of what they do.¹⁸⁶ Dumsday’s argument neatly sidesteps the thorny question of whether or not vigilantes act in an extra-legal fashion by focusing on their (subjective) state of mind instead of the (objective) question of whether they act with formal state permission. Certainly it is understandable why the state should disapprove of a group that does not want to play by the state’s rules, regardless of whether its activities actually transgress legal bounds.

A second viewpoint of the state-vigilante dynamic seems to assume a relationship between the state and vigilantes that is inherently antagonistic.¹⁸⁷ Unlike the Johnstonian perspective, scholars holding this view consider unjustified violence to be an inevitable component of vigilante conduct.¹⁸⁸ Since such disproportionate violence is *per se* not state-sanctioned, this implies that vigilante conduct likewise can under no circumstances be officially condoned by the state. A proponent of this approach is Harris,¹⁸⁹ who views violence as integral to vigilantism. Her notion of vigilantism comprises only “activities that occur beyond the parameters of the legal system”.¹⁹⁰ Martin, who endorses Harris’s outline of vigilante attributes,¹⁹¹ is also of the view that vigilantism is by definition non-state-sanctioned.¹⁹²

¹⁸⁶ Dumsday (2009) *Southern Journal of Philosophy* 53.

¹⁸⁷ Martin (2010) *Acta Criminologica* 57.

¹⁸⁸ See e.g. Buur & Jensen (2004) *African Studies*.

¹⁸⁹ Harris *As for Violent Crime That’s Our Daily Bread*.

¹⁹⁰ 6.

¹⁹¹ 3.

¹⁹² Martin (2010) *Acta Criminologica* 58.

It is submitted that a more nuanced perspective regarding the nature of vigilante-state interactions is required: while not denying that vigilante organisations exist outside the framework of the law, what they do is nonetheless a form of private policing, a “mechanism of governance that can be provided by state and non-state parties alike”.¹⁹³ The boundary between state and non-state policing is a “‘twilight space’ occupied by an alternative citizenry that ‘stands in’ for the state”.¹⁹⁴ In this sense, vigilantism may be seen as a product of the state’s neoliberal tendency¹⁹⁵ to empower communities to “participate in the production of their own security”;¹⁹⁶ vigilantism is thus a side-effect of the blurring of the boundary between public and private that accompanies such outsourcing of government functions.¹⁹⁷ As Bénit-Gbaffou astutely remarks, “can one give residents the duty to ensure their neighbourhood’s own security, and refuse them the right to exclude whomever they consider a threat (or even a risk) to their own local social order?”¹⁹⁸

¹⁹³ Baker (2004) *Society in Transition*; B Baker “Protection From Crime: What Is On Offer for Africans?” (2004) 22 (2) *Journal of Contemporary African Studies* 165 165; B Baker “Living With Non-State Policing in South Africa: The Issues and Dilemmas” (2002) 40 (1) *Journal of Modern African Studies* 29.

¹⁹⁴ A Sen & D Pratten “Global Vigilantes: Perspectives on Justice and Violence” in D Pratten and A Sen (eds) *Global Vigilantes* (2007) 5; also Lund (2006) *Development and Change* 678.

¹⁹⁵ According to Foucault, neoliberalism entails the “economisation” of previously noneconomic spheres and endeavours (W Brown *Undoing the Demos: Neoliberalism's Stealth Revolution* (2015) 52). The related term “governmentality” refers to the “shift away from the power of command and punishing targeting particular subjects and towards the power of conducting and compelling populations ‘at a distance’” (117). “Governance” signifies “a transformation from governing through hierarchically organized command and control ... to governing that is networked, integrated, cooperative, partnered, disseminated, and at least partly self-organized” (123). Such self-organisation entails a hollowing-out of the state, a “governing without government” and a “responsibilising” of individuals – a regime in which “the singular human capacity for responsibility is deployed to constitute and govern subjects and through which their conduct is organized and measured, remaking and reorientating them for a neoliberal order” (123-124; 133). In the criminal justice context, responsibilisation as a “manifestation of human capitalization” (133) involves mobilising private individuals to contribute towards the provision of their own security instead of relying on top-down, centralised law-enforcement. For more on this concept of “deep” neoliberalism and its link with governmentality, see R Venugopal “Neoliberalism as Concept” (2015) 44 (2) *Economy and Society* 165 170. See also Lund (2006) *Development and Change* 692; Comaroff & Comaroff “Popular Justice in the New South Africa” in *Legitimacy and Criminal Justice: International Perspectives* 217.

¹⁹⁶ C Bénit-Gbaffou “Police-Community Partnerships and Responses to Crime: Lessons From Yeoville and Observatory, Johannesburg” (2006) 17 (4) *Urban Forum* 301 310. See also Foucault “Governmentality” in *The Foucault Effect: Studies in Governmentality* for more on the role of “governmentality” in informing this trend.

¹⁹⁷ Lund (2006) *Development and Change* 692.

¹⁹⁸ Bénit-Gbaffou (2006) *Urban Forum* 310-311.

This third perspective is particularly instructive, since “insurgent practices”¹⁹⁹ such as vigilantism cannot be properly understood unless they are seen as evolving alongside – and often entwined with – formally state-sanctioned forms of social control, resulting in a “complex pattern of overlapping [policing] agencies”.²⁰⁰ In this domain of “multi-choice policing”²⁰¹ there is no clearly distinguishable demarcation between sphere of influence of the state and civil society; instead, it is a zone of “ongoing contestation”.²⁰² Even Johnston²⁰³ observes that there is a fine line between vigilance and vigilantism. The margin between community policing in sustained partnership with local state police and community-initiated policing, where there is no such liaison,²⁰⁴ is especially indistinct in instances where, as is fairly common with vigilantes, groups initially function within the parameters of the law but subsequently shift from co-operating with the police to taking the law into their own hands.²⁰⁵

If vigilantism is seen as performing a private policing function it must be recognised, too, that the distinction between voluntary vigilante groups and commercial security firms is likewise not always clear-cut.²⁰⁶ While Johnston asserts that there is a “crucial” distinction between private commercial activity and private voluntary activity, and excludes groups with a commercial motive from the ambit of vigilantism, it is submitted that non-profit-making is not necessarily a defining characteristic of vigilantism. What is relevant is not the voluntary status of the group in question, but their positioning vis-à-vis formal modes of policing. An illegitimate “protection racket”-style private security operation that serves aims of combating social deviance and advancing community order may well be classified as vigilantist even if it charges for its

¹⁹⁹ P Meth “Unsettling Insurgency: Reflections on Women's Insurgent Practices in South Africa” (2010) 11 (2) *Planning Theory and Practice* 241 255.

²⁰⁰ Baker (2004) *Journal of Contemporary African Studies* 170.

²⁰¹ Baker (2004) *Society in Transition* 205.

²⁰² Buur (2006) *Development and Change* 741.

²⁰³ L Johnston “Private Policing, Vigilance and Vigilantism: Commercialisation and Citizenship and Crime Prevention Strategies” in T Bennet (eds) *Preventing Crime and Disorder: Targeting Strategies and Responsibilities* (1996).

²⁰⁴ W Schärf “Community Justice and Community Policing in Post-Apartheid South Africa” (2001) 32 (1) *IDS Bulletin* 74 78.

²⁰⁵ See, e.g., § 7 3 2 below.

²⁰⁶ D Sharp & D Wilson “‘Household Security’: Private Policing and Vigilantism in Doncaster” (2000) 39 (2) *The Howard Journal of Criminal Justice* 113 130.

services, particularly if its business success is reliant on the perception that it is prepared to operate outside the law.²⁰⁷ A good example of a vigilante group that “commodifies” the violence it wields²⁰⁸ is *Mapogo A Mathamaga*, which operates as a non-state-sanctioned and abusive form of private commercial security with a flexible fee structure depending on the financial status of its clients.²⁰⁹ While vigilante groups such as *Mapogo* may have a secondary profit-making aim, their primary focus remains punishing deviance and promoting community security. In this respect vigilantism may be distinguished from commercial “protection-racket” organisations that are not focused on “crime-fighting”. While vigilantes and organised crime groups such as the Mafia share an interest in protection, Abrahams²¹⁰ correctly notes that while vigilante protection is primarily an informal substitute for the *criminal* justice system, the Mafia’s “good works” and “law and order” flavour also extend to a “particularistic and informal *civil* law” aimed at protecting businesses that are unable to avail themselves of more formal and open procedures.

Taking what has been said above into account, the most cogent perspective on the state-vigilante dynamic is one which recognises that vigilantism is both illegal (unjustified in terms of formal legal rules) and extra-legal (existing outside the framework of the law), whilst acknowledging that it is nevertheless a “way of executing state power”,²¹¹ with the relationship of vigilantes and state agencies being at times both intimate and “convivial”.²¹²

²⁰⁷ 130-131.

²⁰⁸ Baker (2004) *Society in Transition* 209.

²⁰⁹ Schärf (2001) *IDS Bulletin*. See B Oomen “Vigilantism or Alternative Citizenship? The Rise of *Mapogo A Mathamaga*” (2004) 63 (2) *African Studies* 153 157-158 for a breakdown of *Mapogo*’s typical fee structures.

²¹⁰ Abrahams *Vigilant Citizens* 166-167.

²¹¹ Kirsch & Grätz “Vigilantism, State Ontologies & Encompassment” in *Domesticating Vigilantism in Africa* 10.

²¹² Buur “Domesticating Sovereigns” in *Domesticating Vigilantism in Africa* 28.

2 6 Fault (blameworthiness or *mens rea*)

Now that the objective *actus reus* – unlawful conduct – components of vigilantism have been considered, it is necessary to focus on those elements that concern the perpetrator's subjective state of mind (*mens rea*) at the time of the vigilante act. It has already been explained that vigilantes often engage in acts of extreme violence. What must be explained further, however, is why the state deems vigilantes personally blameworthy for their conduct, and conversely, the grounds upon which vigilantes dispute this attribution of culpability. It would be unwise for the judiciary to dismiss as irrelevant what vigilantes say about why they do what they do. Acknowledging their underlying motivations, and taking these into account as a component of a separate offence of vigilantism, is key to arriving at a just and workable definition of vigilantism as a crime. As will become clear, the judiciary is compelled to walk an uncomfortable tightrope between acknowledging as mitigatory the root causes of vigilantism (which entails owning up to the failures and shortcomings of the criminal justice system itself) and ignoring those root causes (which risks undermining the integrity and legitimacy of the criminal justice system in the eyes of vigilantes and the communities they claim to serve).

2 6 1 *Intention and direction of will*

In order to be convicted of any of the crimes mentioned in § 2 4 2 above, a perpetrator must both direct their will towards committing the prohibited conduct, and must commit it while knowing it to be unlawful. Although the point of departure is that only those who deliberately cause harm ought to be punished, the concept of intention has extended over time to cover not just deliberately willed but also foreseen conduct.²¹³

In the case of vigilantism, there can be little doubt that, in South Africa at least, vigilantes who engage in acts of violence most often certainly do

²¹³ Burchell *Principles* 344.

direct their will towards achieving²¹⁴ the death or injury of their victims. This is evidenced by their methods; extreme forms of corporal punishment that cannot help but cause serious injury or death. There are two ways of understanding the “direction of will” requirement in relation to vigilantes:

The first perspective on vigilante *mens rea* views vigilantes’ causing death or injury to their chosen victims as being their main aim and object²¹⁵ – it is what they desire to happen. Because committing the prohibited act is the certain goal²¹⁶ of a vigilante perpetrator, vigilantes therefore have intention (to kill, injure, harm, etc.,) in the form of *dolus directus* – (direct) intention in its ordinary everyday meaning. The reason why they desire to kill or injure their victims is regarded merely as their motive for acting, and does not form part of the intention requirement *per se*. Motive is a legal concept distinct and separate from intention. Whereas (direct) intention entails that an accused knows and wills an unlawful act or result,²¹⁷ and is a form of the element of the crime fault that must be proven by the state beyond reasonable doubt for criminal conviction, motive is the accused’s reason for committing the conduct in question. While it may be a useful tool for establishing intention, the motive behind a person’s act is immaterial for the establishment of guilt as such.²¹⁸ The criminal justice system ignores motive for the purposes of proving whether a crime has been committed because “individual motives are too complex and obscure to provide a reliable basis for determining liability for punishment”.²¹⁹ By disregarding the explanation for a person’s actions, the law in effect divorces the morality of their conduct from its legal consequences. Thus a seemingly laudable motive would at most be a factor considered by the court in mitigation of sentence,²²⁰ likewise, an especially heinous motive will not ensure conviction unless the conduct in question is otherwise unlawful and committed with the required *mens rea* (guilty mind).²²¹

²¹⁴ Snyman *Criminal Law* 177.

²¹⁵ Burchell *Principles* 346.

²¹⁶ Snyman *Criminal Law* 177.

²¹⁷ 177.

²¹⁸ Burchell *Principles* 348; Snyman *Criminal Law* 186.

²¹⁹ Burchell *Principles* 349.

²²⁰ *R v Peverett* 1940 AD 213; *S v Hartmann* 1975 3 SA 532 (C); *S v Nkwanyana* 2003 1 SACR 67 (W).

²²¹ Burchell *Principles* 350.

As already mentioned, vigilantes claim to have pure motives: they believe their conduct to be morally justified, since they feel impelled by righteous anger and community duty to perform violent self-help in circumstances where they perceive there to be no other feasible alternative available.²²² According to this perspective, vigilantes' ostensibly pure motives might be taken into account when determining an appropriate punishment, but would be irrelevant for deciding whether they should be convicted or acquitted in the first place.

The second perspective distinguishes between general and specific intent in the vigilante scenario. According to this argument, while vigilantes do have the general intention to harm others, this is not in actual fact their primary aim and object. Rather, it is merely an inevitable by-product of achieving their true goal: punishing deviance so as to enhance collective security and build a moral community in the face of state apathy, inadequacy or incompetence. According to this interpretation of vigilante *mens rea*, vigilantes have the form of intention known as *dolus indirectus* in respect of the harm they cause to their victims. Indirect intention is present where the unlawful conduct or consequence is not an accused's aim and object, but is foreseen as "virtually certain" if their main objective is to be achieved.²²³ Because of the degree of force used in most acts of vigilante punishment, it can scarcely be said that vigilantes foresee death or injury only as a possibility, which is the requirement for the lesser form of intention termed *dolus eventualis*. The methods vigilantes employ lead to a compelling inference that such unlawful consequences are foreseen as unavoidable, not merely possible – hence, they would seem to act with *dolus indirectus*.

According to this second perspective, then, vigilantes' desire to achieve security and social order is not simply their reason for causing harm, but is in fact a necessary element of the crime itself. If vigilantes' main aim is the desire to punish wrongdoers in order to enhance collective security, this elevates their crime-fighting objectives to a status higher than mere motive: it is a crucial component of their activities, the driving force behind their crimes.

²²² J Reiner "The Social Organization of Vengeance" in D Black (eds) *Toward a General Theory of Social Control Volume 1: Fundamentals* (1984).

²²³ Burchell *Principles* 346

Burchell acknowledges that “[t]he definition of *dolus directus* in terms of the ‘aim and object’ of the accused to commit the crime, appears ... to make motive or purpose a specific element of that special form of intention”.²²⁴ The insight that there may indeed be instances where it is hard if not impossible to distinguish an accused’s main aim (intention) from their purpose (motive) is an important one. It is submitted that crafting a separate crime of vigilantism requires recognising vigilantes’ goal of making the community a safer and more secure place to live in through punishing deviance as a special form of specific intention – i.e., making their underlying objectives form a crucial element of the crime. Requiring proof beyond reasonable doubt that a particular crime was committed with the specific aim and object (*dolus directus*) of offering guarantees of collective security and/or of enhancing social order by inflicting punishment on wrongdoers would allow courts to distinguish clearly between vigilantism and purely gratuitous violence, and thus better enable courts to fashion appropriate punishments for those convicted of vigilantism. This penalty aspect is considered further at length in §§ 6 3 2 3 and 7 5.

The idea that two forms of intention could be required to find an accused guilty of a particular crime is not unprecedented. For example, in terms of international criminal law, the mental element of the crime of genocide requires not only “intent and knowledge” of all the material elements of that crime, but also the “specific intent to destroy in whole or in part a national, ethnic, racial or religious group as such”.²²⁵ Having the purpose of systematically destroying a group in whole or in part is a precondition for individual criminal responsibility for genocide, regardless of whether the group is actually destroyed. Similarly, convicting an accused of the crime of assault with intent to cause grievous bodily harm (“GBH”) requires two manifestations of intention: the intention to assault as well as the intention to cause GBH. An accused with the specific intent to cause GBH may be convicted of assault GBH regardless of whether serious harm – or any harm at all – actually materialises; conversely, even where serious injury is caused, if an accused

²²⁴ 348.

²²⁵ G Werle *Principles of International Criminal Law* (2005) 192; 207-210.

lacks the specific intention to cause GBH they are at most guilty of common assault. Thus if this specific intent to cause GBH is present and can be proven, it in effect “transforms” common assault into assault GBH. Similarly, it may be argued that vigilantes’ goal of protecting their community by punishing perceived deviance in the absence of effective state provision of security may be seen as transforming the general crimes of murder, assault, etc. into the specific crime of vigilantism.

Of the two ways of understanding vigilante intention outlined above, the second approach is more persuasive. While the first perspective relegates vigilante rationales to the secondary status of mere motive, the second acknowledges that vigilantes’ motivations are what set them apart from “ordinary” criminals, and that for this reason, their specific intent should form part of the elements of a separate crime of vigilantism. However, regardless of whether vigilantes’ motivations are deemed to be their motive or their specific intention, the reasons why they do what they do are discussed at length below at § 2 6 3.

2 6 2 *Intention and consciousness of wrongfulness*

Having thoroughly explored the implications of the “direction of will” requirement of intention for a crime of vigilantism, it is now necessary to consider briefly whether vigilantes also possess the required consciousness of wrongfulness for intention to be present – i.e., do they indeed know or at least foresee that what they are doing is against the law, or might they instead conceivably perceive their conduct to be legally justified? If such subjective knowledge of unlawfulness is lacking, intention in the technical legal sense of the word is absent. Thus even if – as was argued above²²⁶ – vigilante conduct does exceed the bounds of that permitted in terms of private defence, it must still be considered whether vigilantes may raise the defence of putative private defence excluding fault. This defence applies where an accused genuinely but mistakenly subjectively believes that their conduct falls within

²²⁶ At § 2 5 1 2 5.

the bounds of this recognised ground of justification, whereas on the objective facts their conduct exceeds such limits.²²⁷ Could vigilantes accused of crimes such as murder and assault not be acquitted on the basis that they lack intention since, owing to their *bona fide* mistaken belief that they were entitled to act in defence of protected legal interests, they have no consciousness of wrongfulness? If such belief were reasonable as well as genuine, their conduct would also not be negligent.²²⁸

Despite it appearing to be a promising avenue of criminal defence for the vigilante, it is submitted that vigilantes are unlikely to be able to rely on putative private defence in practice. In the context of comparing private defence and vigilantism,²²⁹ the question of whether vigilantes' conduct is objectively justified was raised, and the conclusion was that it was not – *inter alia* because vigilantes aim is *not* merely temporarily to uphold the legal order on the state's behalf. Assuming this is correct, it would be disingenuous to claim that vigilantes honestly but mistakenly believe that all they are doing is temporarily warding off an unlawful attack on behalf of the state, as is required for successful reliance on putative private defence: the scope of what they do goes well beyond what would be sanctioned by law in terms of private defence, but this does not deter them from continuing anyway. Assuming – with good reason, it is submitted – that vigilantes know or foresee that the law would frown upon their version of private defence, their subjective state of mind definitely denotes intention. According to Burchell, for the “knowledge of unlawfulness” requirement of intention to be fulfilled it is sufficient for an accused to foresee the possibility that their conduct is “contrary to the law in the broad sense” and yet to proceed, “reckless as to whether it was or not”.²³⁰ It is thoroughly unconvincing to argue that vigilantes might be unaware of the

²²⁷ See, e.g., *S v De Oliveira* 1993 2 SACR 59 (A) 63H-J, where the legal principles relating to putative private defence are discussed; also *S v Joshua*; *S v Naidoo* 1997 1 SACR 62 (T), where the putative private defence was successfully relied upon to exclude intention.

²²⁸ This is because the test for negligence measures the conduct of the accused against that of a so-called “reasonable person”. If the reasonable person would also mistakenly have believed it justified to act in private defence, this shows that the accused's conduct does not deviate from that which is expected of the reasonable person. This form of putative private defence would be relevant in the instance of crimes such as culpable homicide, where the requisite form of fault is negligence not intention.

²²⁹ See from § 2 5 1 above.

²³⁰ Burchell *Principles* 383.

state prohibitions on murder or assault, for example, or that they might not know that their actions are in contravention of such proscriptions, as well as in excess of what is permitted in terms of private defence.

There can be little doubt that vigilantes are aware that their conduct is not *legally* justified; nevertheless, there is a strong argument to be made that they view it as *morally* justified. It is now necessary to consider how vigilantes explain the motivations behind their acts – their “ostensibly noble cause”²³¹ – in more detail.

2 6 3 Vigilante motivations

In discussing why vigilantes do what they do, the term “motivations” is used, rather than either “motive” or “specific intention”, to denote that regardless of which of the two approaches to direction of will discussed above is followed in practice, decoding vigilante objectives is central to understanding their particular brand of violence.

It was noted previously that vigilantes claim to have pure motives. However, even if such assertions are accepted at face value, from a legal perspective this does not detract from vigilantes’ *mens rea*: although vigilantes take the moral high ground, distinguishing their conduct from that of “real” criminals,²³² there is no denying that they direct their will towards performing harmful acts, including murder, assault, kidnapping, malicious damage to property and arson, despite knowing them to be against the law.²³³

The paradox of vigilantes claiming to fight crime whilst simultaneously committing it is at the heart of the ambiguity of legal responses to vigilante violence. One of the aims of this study is to determine whether the default legal response – that morality and the application of the law should part ways where vigilante motivations are concerned – is the most helpful perspective

²³¹ *S v Thebus* 578I.

²³² See, e.g., § 5 2 1 1 below.

²³³ See, e.g., *S v Hartmann*, *R v Peverett* and *S v Nkwanyana* for instances where individuals claimed to be acting with laudable motives when causing death – euthanasia-type cases – but were nevertheless convicted of murder.

when it comes to tackling vigilantism, and to explore ways in which the criminal justice system may indeed take cognisance of vigilantes' motivations when deciding on the most appropriate way to deal with them. With this in mind, it is submitted that vigilantes have two main and interconnected motivations for their actions, namely punishing their chosen victims and offering guarantees of security and order to the communities whom they "serve".

2 6 3 1 *Punishing deviance*

There is disagreement among scholars regarding whether vigilantism necessarily entails a punishment component. Whereas Johnston views punishment, while commonly occurring, as "a variable, rather than a constant, feature of vigilantism",²³⁴ authors such as Harris,²³⁵ Baker,²³⁶ and Martin²³⁷ consider its punishing function to be a theoretical prerequisite, a defining characteristic of vigilantism. This second perspective regards "punitive violence [as] integral to vigilante methodology"²³⁸ – a primary means of distinguishing vigilantism from other forms of violence.

While Johnston's view that punishment can be distinguished from "mere" violence on the basis that is "premeditated, systematic, calculated, and often displays ritualistic and quasi-judicial characteristics"²³⁹ has a ring of truth,²⁴⁰ his contention that not all acts of vigilante violence constitute punishment is misconceived. First, the examples of "vigilantism" he cites as not having a punishment element do not support his argument. They involve state-sanctioned self-help (shooting a burglar in private defence during a struggle; citizen street patrols aimed at prevention only), and as such cannot be regarded as true examples of vigilantism at all.²⁴¹ Second, by arguing that

²³⁴ Johnston (1996) *British Journal of Criminology* 233.

²³⁵ Harris *As for Violent Crime That's Our Daily Bread* 4; 23-24.

²³⁶ E.g. Baker (2004) *Journal of Contemporary African Studies* 165.

²³⁷ Martin (2010) *Acta Criminologica*.

²³⁸ 57.

²³⁹ Johnston (1996) *British Journal of Criminology* 233.

²⁴⁰ See § 5 4 1 1 below for more on the ritualistic and quasi-judicial nature of vigilante practices.

²⁴¹ For more on vigilantism as non-state sanctioned, see § 2 5 2 above.

where vigilante violence is thwarted, by police intervention for instance, no punishment is involved, he fails to recognise that for legal purposes it is irrelevant whether intended harm actually materialises: the law denounces unsuccessful attempts to punish by violent means for many of the same reasons that it condemns attempts that succeed.²⁴² His argument is tantamount to contending that someone who aims to shoot another, but misses, or who is prevented from shooting at the last moment by forces beyond his control, should not be held liable for attempted murder because no injury was caused. It ignores that person's blameworthy state of mind and the fact that their criminal conduct – albeit incomplete – demonstrates their propensity to cause harm. Similarly, it is hard to understand how Johnston could dismiss a 16-year-old suspect who was interrogated, while being threatened with being cut with a knife or doused with petrol if he failed to reply, before being dumped by the roadside, as not having been subjected to “actual punishment”.²⁴³ Presumably he does so because he fails to appreciate that assault includes both the application of force and inspiring the belief in one's victim that physical force is immediately to be applied to them.²⁴⁴ For the duration of the assault the 16-year-old was surely under the impression that impairment of his bodily integrity was immediately to take place,²⁴⁵ and would have felt that he was being punished. Last, even if one does regard the dubious vigilante example of the citizen street patrol as “autonomous” rather than “responsible” citizenship, Johnston is mistaken in his view that such vigilantism aimed primarily at preventing wrongdoing rather than punishing it *per se* cannot simultaneously amount to punishment. What he overlooks is that regardless of their purported chief motivation, such vigilantes' violent conduct generally does – and is intended to – inflict harm on those subject to it. Even where punishment is not vigilantes' primary aim, vigilante victims certainly experience the hurt they suffer as punishment.²⁴⁶

²⁴² See also Snyman *Criminal Law* 275; Burchell *Principles* 515-517.

²⁴³ Johnston (1996) *British Journal of Criminology* 233.

²⁴⁴ Burchell *Principles* 577.

²⁴⁵ Snyman *Criminal Law* 447.

²⁴⁶ *Contra* Black “Crime as Social Control” in *Towards a General Theory of Social Control Volume 2: Selected Problems*, who argues that “collective liability” informal social control does not require victims to be aware that they are being “punished” for their “misdeeds”.

Bearing the above in mind, it may be concluded that punishment is indeed an integral component of vigilantism.²⁴⁷ The victims of vigilante violence are not random targets. Vigilantes inflict pain and suffering on those they perceive to be wrongdoers worthy of condemnation, which is precisely what punishment entails. What will be considered next is what vigilantes hope to achieve by punishing those whom they regard as deviants. The discussion that follows isolates the various potential justifications that have been put forward for criminal punishment in general, and applies each so-called “punishment theory” to vigilante-inflicted punishment in particular. The aim is to show that there is a good deal of overlap, at least as regards the ostensible reasons for punishment provided by vigilantes and by the formal criminal justice system, but also to highlight their differences, where applicable.

2 6 3 1 1 Link to punishment theories

Any punishment – whether emanating from the state or from private individuals – entails an infringement of the rights of those who are punished. In the same way as judicial officers need to make explicit to the person being punished as well as the wider community their reasons for imposing a particular penalty in order for their conduct not to be perceived as arbitrary and irrational, so too vigilantes’ legitimacy may be enhanced if they are able to justify their resorting to extreme force to the satisfaction of the communities they purport to serve.²⁴⁸ The various rationales for imposing punishment are known as punishment theories. Punishment theories are divided into two main categories: absolute and relative punishment theories. Absolute theories, which are sometimes viewed as a single theory,²⁴⁹ have a retrospective focus and view punishment as an end in itself, whereas relative

²⁴⁷ See also D Garland “Penal Excess and Surplus Meaning: Public Torture Lynchings in 20th Century America” (2005) 39 (4) *Law and Society Review* 793 795; 828, where he characterises the “public torture lynchings” that took place in the USA between 1890 and 1940 as “first and foremost, collective [summary] criminal punishments”.

²⁴⁸ For more on this aspect of vigilante self-legitimation, see § 5 2 1 below.

²⁴⁹ See e.g. Snyman *Criminal Law* 11.

theories are forward-looking, seeing punishment as a means to achieve a variety of further ends.

The idea behind the absolute (or retributive) theories is that one who has caused harm must suffer harm. There are various ways to express this idea:

First, the focus of punishment may be to appease the community by satisfying their thirst for vengeance against the wrongdoer. The perception of vigilantes as “avengers of wrong”²⁵⁰ who mete out “instant, retributive justice”²⁵¹ is widespread in popular²⁵² and vigilante discourse. It is borne out by the extent to which the extreme force used by vigilantes may be seen as gratifying community members’ punitive sentiments, thus giving their basic urge for violent retribution free rein.²⁵³

Second, punishment may be regarded as a way for a wrongdoer to be restored to moral goodness by paying his debt to society – the idea of punishment as atonement. Buur and Jensen endorse the vigilante viewpoint that deviant outsiders may be redeemed through vigilante violence and pain, thus enabling them to “re-enter the moral community”.²⁵⁴ Vigilantes view corporal punishment as a necessary and corrective means to exorcise evil and immoral behaviour.²⁵⁵

Third, punishment may serve a denunciatory function: it is a way of formally expressing condemnation of the deviant behaviour, and thus also symbolically proclaiming community beliefs and values by demonstrating how those who violate them will be treated. Indeed, vigilante violence’s crucial symbolic function of sanctifying deeply-cherished societal values has long been recognised.²⁵⁶

²⁵⁰ Baker (2002) *Journal of Modern African Studies* 39.

²⁵¹ Harris *As for Violent Crime That’s Our Daily Bread* 3; also Martin (2010) *Acta Criminologica* 58.

²⁵² See Nina (2000) *African Security Review* 18.

²⁵³ Nel (2014) *Acta Criminologica* 31.

²⁵⁴ Buur & Jensen (2004) *African Studies* 147-148.

²⁵⁵ 148.

²⁵⁶ See R Brown “The American Vigilante Tradition” in H Graham and T Gurr (eds) *The History of Violence in America* (1969); R Brown “The History of Vigilantism in America” in H J Rosenbaum and P C Sederberg (eds) *Vigilante Politics* (1976).

Fourth, punishment is seen as a wrongdoer's "just desert" in that it restores the moral balance of society²⁵⁷ that has been disturbed by the deviant behaviour. The idea of restoring moral balance presupposes that the extent of punishment must be proportionate to the extent of harm caused by the wrongdoer²⁵⁸ – i.e., that the punishment must "fit" the crime. Vigilante-inflicted penalties seldom comply with this requirement. As has already been seen, it is common for a petty thief to be killed by vigilantes – a punishment grossly disproportionate to the crime.

There are also numerous relative (or utilitarian) punishment theories, which justify punishment on the basis of its social benefit:

First, punishment may be of such a nature that it incapacitates wrongdoers, making it difficult or impossible for them to reoffend. The aim of punishment is thus to prevent future deviance. The most common incapacitating punishment resorted to by vigilantes is their use of the 'death penalty'. Harris goes so far as to say that death is "built into the form that the vigilante act adopts".²⁵⁹ Needless to say, someone who is dead is permanently prevented from reoffending.

Second, punishment may be aimed at instilling fear²⁶⁰ in the wrongdoer so that they will be less inclined to commit further wrongs. This idea of punishment as persuasive tool may extend to the wider community; after witnessing the pain and suffering inflicted on a wrongdoer, those who have not yet offended may be disinclined to commit deviant behaviour in order to avoid being exposed to similar punishment themselves. Harris separates out this "warning" aspect of vigilantism from its "punishing" (presumably retributive) function. Although she conflates warning (deterrence) and prevention, the value of individual and general deterrence is clearly foremost in Harris's conception of the secondary function of vigilante punishment. She

²⁵⁷ The idea behind this is symbolised by the "mystical balance" of the scales of justice that have been upset needing to be corrected, or restored to equilibrium – see C Shearing "Punishment and the Changing Face of the Governance" (2001) 3 (2) *Punishment and Society* 203 206.

²⁵⁸ Snyman *Criminal Law* 13.

²⁵⁹ Harris *As for Violent Crime That's Our Daily Bread* 4.

²⁶⁰ Vigilantism's capacity to instil fear in both its immediate targets and those who witness violent vigilante punishment is considered further in § 5 4 1 1 below.

rightly points out that “[the public], visible and immediate nature of vigilante violence, as well as the extreme pain that is inflicted on victims, serves as a deterrent for both the victim and members of the audience”,²⁶¹ and observes that “[i]t warns the victim and onlookers that their future actions will be violently punished if they do not follow the vigilante ‘rules’”.²⁶² The idea of extreme violence in the form of corporal punishment being a more effective deterrent than more human rights-focused penalty options is also a common theme in vigilante discourse.²⁶³ The punishment theory of general deterrence makes it permissible to impose an exemplarily harsh punishment that is disproportionate to the harm inflicted by the wrongdoer, on the basis that it will better deter prospective malefactors. The wrongdoer is in effect sacrificed for the sake of the community to further the aim of deterrence and community solidarity. The operation of this type of scapegoat mechanism in the context of the vigilante version of general deterrence is explored at length in § 5 3 2 1.

Third, the punishment theory of reinforcement regards punishment as an educational tool – a means of creating and reinforcing respect for societal norms, thus inducing obedience and inhibiting contraventions. The idea behind this punishment theory is that the norms and standards of society need to be given moral weight not only by prohibiting certain conduct, but also by backing up the prohibition with suitable punishments. Meth argues that even very violent vigilante practices may be justified as being a means of forming a “moral community” by teaching criminals appropriate moral codes and so “correcting immoral behaviour”.²⁶⁴ Buur confirms that vigilante violence may perform the function of socialising its victims into knowing the difference between right and wrong, thus helping them to become moral human beings.²⁶⁵

Fourth, punishment may be seen as a way to reform wrongdoers by “re-educating” them to become useful members of society. *Mapogo A*

²⁶¹ Harris *As for Violent Crime That’s Our Daily Bread* 24.

²⁶² 23.

²⁶³ See, for instance Oomen (2004) *African Studies*, where a cow thief who was beaten by a *Mapogo A Mathamaga* member is quoted as vowing that “anyone who got flogged like me will never steal again”.

²⁶⁴ Meth (2010) *Planning Theory and Practice* 256.

²⁶⁵ Buur (2003) *Anthropology and Humanism* 25.

Mathamaga's website says that its African style of justice aims at immediately dealing with miscreants "in a traditional way to an extent that they will become exemplary citizens serving an integral part in our community."²⁶⁶ While this is probably merely a rationalisation to make their violence more palatable for external consumption, the sense of violence as educational medium has already been referred to above, and the idea of vigilante punishment as a means of rehabilitation has a modicum of persuasive force.

Needless to say, it is unnecessary and unhelpful to isolate one single punishment theory as being the one that best accounts for all cases of vigilante violence. As is the case with state punishment, while the underlying foundation justifying punishment must always be that punishment is deserved, with retribution being the indispensable point of departure in this regard, there will necessarily be additional purposes for punishment in each particular instance. Because vigilantes target those they perceive to be deviant, their form of violence falls loosely within the broad category of retribution. However, using the term retribution in the vigilante context has the troublesome implication that the victim "somehow deserves what is meted out"²⁶⁷ to them. The extreme violence of much vigilantism certainly does not sit comfortably within the bounds of what is usually conceived of as "deserved punishment" in the legal sense. Beyond the permanently incapacitating function of the 'death penalties' imposed by vigilantes, the only possible explanation for disproportionately harsh vigilante 'sentences' is with reference to the punishment theory of general deterrence; in being given an over-harsh punishment, the individual wrongdoer is sacrificed for the good of the wider community. This punishment theory has rightly been criticised on the grounds that it reduces the individual to a mere instrument ostensibly so as to improve society, instead of as a "free, responsible agent who gets only what he deserves".²⁶⁸

²⁶⁶ Anonymous "Mapogo A Mathamaga" *Mapogo A Mathamaga*.

²⁶⁷ Abrahams "What's in a name?" in *Informal Criminal Justice* 29.

²⁶⁸ Snyman *Criminal Law* 17. See also *S v Dodo* 2001 1 SACR 594 (CC) para 38: "To attempt to justify any [punishment] without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to

There is no doubt that the disproportionality which vigilante punishment almost inevitably entails violates the right to human dignity, in addition to the right to bodily integrity and even to life. It is thus clear that while they share with the formal criminal justice system the desire to offer community members greater peace of mind and security, vigilantes prioritise the protection of communal interests above individual human rights when inflicting punishment. Key underlying justifications for punishment – both formal and informal – are to satisfy the community’s righteous indignation (retribution), to protect them from potentially dangerous deviants (prevention) and to deter other community members from wrongdoing (general deterrence). For vigilantes, these concerns are paramount, unmitigated by considerations of just desert. This vigilante desire to guarantee security and exercise social control at all costs will now be elucidated further.

2 6 3 2 *Promoting community interests*

In his characterisation of vigilantism, Johnston emphasises that one of its important aims (in addition to its being a normative response to deviance) is social control motivated by a desire to offer guarantees²⁶⁹ of security²⁷⁰ in the face of an ineffective system of formal control. He regards the expectation of personal security as fundamental to social identity, “something which the average citizen demands as a condition of life in a civilized society”.²⁷¹ Vigilante action is one of the ways to fulfil that demand: in a social context where security is “commodified”, “employing” vigilantes is an important means of obtaining security services in the absence of adequate state provision.

an end. Where ... a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender’s dignity assailed.”

²⁶⁹ Shearing (1992) *Crime and Justice* 401-402 notes that the idea of a “guarantee” in this context can be linked to the Old English word “grith”, defined as “guaranteed security, defence, safe-conduct”. It has connotations of protection and sanctuary.

²⁷⁰ In this context, security is defined as “a state of affairs that allows the stable enjoyment of life and property” – see J Brodeur & C Shearing “Configuring Security and Justice” (2005) 2 (4) *European Journal of Criminology* 379–385.

²⁷¹ Johnston (1996) *British Journal of Criminology* 231-232.

This ties in with Baker's view of vigilantism as one of many forms of policing²⁷² – policing being defined by him as “any organised activity that seeks to ensure the maintenance of communal order, security and peace”,²⁷³ and is confirmed by Weisburd's empirical research endorsing the role of the vigilante as agent of community social control.²⁷⁴ As is indicated below, however, vigilantes regard their continual everyday policing practices²⁷⁵ as more than simply a means of advancing community safety and security; vigilante violence plays a crucial role in creating and confirming the moral values of the communities in which vigilantes operate – values which may well be contrary to those of the state.

Johnston views security as involving the preservation of an “established order” against internal threat.²⁷⁶ However, there is no reason why a vigilante ideology should necessarily be “in favor of ‘what is’”,²⁷⁷ as Rosenbaum and Sederberg put it, as opposed to invoking an “imagined order” that either existed in the past, or never existed but is desired.²⁷⁸ Rather than simply upholding the unsatisfactory *status quo*, vigilantism may actually be a “rudimentary social movement”²⁷⁹ attempting to establish a counter-hegemonic new vision of community values and ideals. From a vigilante perspective, those who engage in vigilante acts are not merely addressing security concerns, thus guaranteeing “a particular vision of order”:²⁸⁰ they are also “the embodiment of the moral, virtuous community”²⁸¹ itself – tasked with

²⁷² See, e.g., I Loader “Plural Policing and Democratic Governance” (2000) 9 (3) *Social and Legal Studies* 323 on the distinction between “the police” and “policing”.

²⁷³ Baker (2004) *Journal of Contemporary African Studies* 165; B Baker *Security in Post-Conflict Africa: The Role of Non-State Policing* (2010) 9.

²⁷⁴ D Weisburd “Vigilantism as Community Social Control: Developing a Quantitative Criminological Model” (1988) 4 (2) *Journal of Quantitative Criminology* 137 151-152.

²⁷⁵ Buur & Jensen (2004) *African Studies* 146.

²⁷⁶ Johnston (1996) *British Journal of Criminology* 321.

²⁷⁷ H J Rosenbaum & P C Sederberg “Vigilantism: An Analysis of Establishment Violence” in H Rosenbaum and P Sederberg (eds) *Vigilante Politics* (1976) 27.

²⁷⁸ Nina (2000) *African Security Review* 21-27. See also Dumsday (2009) *Southern Journal of Philosophy* 55-56 and § 2 5 1 1 1 above.

²⁷⁹ Johnston (1996) *British Journal of Criminology* 232.

²⁸⁰ Schärf (2001) *IDS Bulletin* 43. See also S Bangstad “Hydra's Heads: PAGAD and Responses to the PAGAD Phenomenon in a Cape Muslim Community” (2005) 31 (1) *Journal of Southern African Studies* 187 207, who opines: “The underlying discourse of [vigilante group] PAGAD is a language that speaks of the protection of community, that speaks of the need to ‘protect our children’ and the ‘reinstatement of a moral order’”.

²⁸¹ Buur & Jensen (2004) *African Studies* 146.

“conjur[ing] the community from the ashes”.²⁸² This links with the educative function of vigilantism referred to earlier in the context of the reinforcement punishment theory.²⁸³ By inflicting violence on those who “undercut and imperil”²⁸⁴ what they define as values that are important to the community, vigilante groups are in effect establishing and enforcing “new visions of moral being and social responsibility”.²⁸⁵ As is detailed from § 5 3 below, vigilantism aims to promote community cohesion by defining group membership in terms of those who are excluded as “the repulsive other”.²⁸⁶ Thus in the process of providing security guarantees, vigilantism also achieves a form of community-building²⁸⁷ that entails marshalling the moral community against those forces who would threaten to destroy social order and collective security.

2 6 4 Fault: conclusion

The discussion of *mens rea* above shows clearly that in addition to their conduct objectively being unlawful and prohibited by law, vigilantes do indeed possess consciousness of wrongfulness in the sense that they subjectively know or foresee that their conduct is not state-sanctioned. Their intention to commit a crime notwithstanding, the analysis of vigilante motivations makes it clear that – at least ostensibly – vigilantes do view their own actions as morally justified. This is because they believe the targets of their violence to be deserving of punishment, and see what they themselves do as necessary for enhancing collective security and building a moral community in the face of state apathy, inadequacy or incompetence. Needless to say, their seemingly praiseworthy motivations are not grounds for a complete acquittal in the eyes of the law, however. As is argued below in §§ 6 3 2 3 and 7 5, in appropriate instances vigilantes’ motivations could –

²⁸² Comaroff & Comaroff “Popular Justice in the New South Africa” in *Legitimacy and Criminal Justice: International Perspectives* 233.

²⁸³ See § 2 6 3 1 1 above.

²⁸⁴ Buur (2006) *Development and Change* 754.

²⁸⁵ Comaroff & Comaroff “Popular Justice in the New South Africa” in *Legitimacy and Criminal Justice: International Perspectives* 233.

²⁸⁶ R Thurston Witch, *Wicce, Mother Goose: The Rise and Fall of the Witch Hunts in Europe and North America* (2001) 34.

²⁸⁷ Meth (2010) *Planning Theory and Practice* 245.

and probably should – be taken into account as a powerful factor in mitigation of sentence in the penalty phase of the trial, even where the serious and violent nature of the crime committed would in other circumstances warrant an especially harsh punishment.

2 7 Defining vigilantism as a crime

Now that the groundwork has been laid by analysing vigilantism from the perspective of the elements of criminal liability, what still remains is to arrive at as concise a legal definition for the phenomenon as possible, which nonetheless still contains all its essential elements. The definition below assumes that vigilantism should be a separate criminal offence so that those formerly charged with specific offences committed during episodes of vigilantism could be convicted instead of vigilantism itself.

There are many reasons for advocating the separate criminalisation of vigilantism, many of which are canvassed in more detail at § 6 3 2 3. The main reason for criminalising what vigilantes do as vigilantism *per se* is that is simply fairer. As will become plain in § 6 3 2 2, where a group of vigilantes is involved in a killing, the tendency is for the state to charge all participants with murder, irrespective of their degree of participation. Even minor participants, whose conduct has not been proven to have contributed causally to the death, may be successfully prosecuted, provided they share a so-called “common purpose” with the actual killers. It is submitted that this practice contradicts the principle of “fair labelling” whereby, according to Ashworth, “[f]airness demands that offenders be labelled and punished in proportion to their wrongdoing”.²⁸⁸ The labelling of an offence should be fair both in the descriptive sense (in that it captures the essence of the wrongdoing itself) and in the sense of that it fairly differentiates the offence from other criminal acts.²⁸⁹ Offence names communicate information about the offender to the public as well as to decision-makers and agencies operating both within and

²⁸⁸ Ashworth *Principles* 88-89.

²⁸⁹ Chalmers & Leverick (2008) *Modern Law Review* 238-239.

outside the criminal justice system, enabling such audiences to respond appropriately.²⁹⁰ Offenders also have a legitimate interest in protecting their reputation against the stigma that may result from the use of imprecise or potentially misleading labels.²⁹¹ Having the offence name reflect the true nature of the offender's conduct is therefore necessary both for reasons of fairness to the offender as well as for public protection.

Applying the case in favour of fair labelling to vigilantes, it has been argued above²⁹² that the motivation for vigilante conduct is distinct from that of other violent crimes, and for that reason vigilantes (not only minor participants, but also those who actually cause serious harm) should be separately labelled so as to denote the nature of their wrongdoing accurately. Being labelled a "vigilante" as opposed to a "murderer" could have far-reaching (and potentially positive) ramifications for an offender, both relating to how their case is handled by the courts and to matters such as their future employment prospects. From a criminal justice perspective, the significant difference between charging an accused with vigilantism as opposed to murder, assault, public violence etc. is that the vigilante motivation is included in the definition of the crime itself, with the idea being that it should be taken into account when determining an appropriate (more community-based and restorative) sentence. It is submitted that charging those involved in serious incidents of mob justice with vigilantism would be a win-win in practice. Because it is to an accused's benefit to be convicted of vigilantism rather than a crime such as murder, the state would be more likely to obtain their co-operation by offering them the option of pleading guilty to vigilantism, rather than having to go to trial on a more serious charge. This could reduce costs and eliminate potential delays in the criminal justice process. While the assumption is that having vigilante motivations would be a mitigating factor, specifically defining vigilantism as a crime nevertheless makes it clear that the conduct in question is definitely not state-sanctioned.

²⁹⁰ E.g., making informed decisions about how to punish or whether to employ a particular offender.

²⁹¹ Chalmers & Leverick (2008) *Modern Law Review* 237.

²⁹² At § 2 6 3.

The proposed crime of vigilantism consists of:

(1) a **person or persons** acting in their **private capacity** (2) **unlawfully** and (3) **intentionally** (4) using or threatening to use **force** (5) which is directed against the **person and/or property of another** (6) who is the **perpetrator** of an actual, potential or imputed criminal or non-criminal **wrongdoing**, (7) with the specific aim of (a) **punishing** such person and (b) offering guarantees of **collective security** and/or enhancing **social order** (8) in circumstances where there is a real or perceived **absence of effective formal guarantees of order and security**.

A few points of clarification about the various elements of vigilantism identified above:

Unlike that of Johnston,²⁹³ this definition makes no assumption about whether vigilantism is premeditated or spontaneous – it could be either. Element (1) is included to show that vigilantism may be perpetrated by individuals and groups alike, but not by agents of the state acting in their official capacity. Element (2) implies not only that acts of vigilantism must not fall under any of the recognised grounds of justification, but also underlines its formally non-state-sanctioned status. Element (3) refers to the fact that vigilantes direct their will towards acting unlawfully, despite knowing or foreseeing that their conduct is prohibited by law. Element (4) focuses on the crucial (potential) violence aspect of vigilantism, while element (5) acknowledges that vigilantism may entail acts of violence against both the person and the property of victims, such as the burning of their houses. Element (6) defines the victims of vigilante violence by specifying that they are singled out for punishment because they individually are perceived to be wrongdoers, rather than simply being “innocent” members of a wider group or social category that has been deemed undesirable and targeted for this reason. This distinguishes vigilantism from phenomena such as “xenophobic” attacks, where acts of violence are committed indiscriminately against the target group, with perpetrators imposing a form of collective liability whereby

²⁹³ Johnston (1996) *British Journal of Criminology*.

any member of the relevant social category may be vulnerable to attack.²⁹⁴ It also excludes violent collective protest (what may be termed social justice activism),²⁹⁵ where the focus is often to destroy state property such as public libraries and clinics to express grievances about service delivery, rather than to fight crime or deviance.²⁹⁶ Element 7 refers to vigilantes' specific intention. Element (7a) emphasises vigilantism's punishment function, with punishment being used in the multifaceted sense explained in the section about punishment theories above, encompassing aspects such as retribution, prevention, deterrence and reinforcement. Element (7b) is required to show that vigilantes act not only in their own interest, but also out of concern for the wider community interests in achieving security and order. Element (8) is an attempt to acknowledge vigilantes' perception that their acting as state substitutes is a necessary measure if security and order are to be upheld or maintained. To prevent the risk of the state not choosing to utilise the crime of vigilantism for fear of having to prove that their criminal justice provision is ineffective to obtain a conviction, it may even be preferable for there to be a presumption that this element has been complied with in circumstances where obtaining effective access to formal policing is objectively impracticable, provided that all the other elements listed above are present. Conversely, if state alternatives were indeed readily available, but there was no attempt to resort to them, this requirement could also help safeguard the state from those accused of serious offences such as murder falsely claiming to have acted as vigilantes so as to escape harsher punishment. Although element (8) has a subjective dimension, since it refers to the "real or perceived" absence of formal security guarantees, it should be easy to show that an accused's belief that formal security options were unfeasible was not genuine

²⁹⁴ For more on this useful point of distinction between vigilantism and phenomena such as rioting and terrorism, see Senechal De La Roche (1996) *Sociological Forum* 102-105. See also L B Landau *Exorcising the Demons Within: Xenophobia, Violence and Statecraft in Contemporary South Africa* (2011) for an insightful exploration of the 2008 spate of xenophobic attacks in South Africa, particularly T Monson "Making the Law; Breaking the Law; Taking the Law into Our Own Hands: Sovereignty and Territorial Control in Three South African Settlements" in L B Landau (eds) *Exorcising the Demons Within: Xenophobia, Violence and Statecraft in Contemporary South Africa* (2011), where xenophobia is analysed in terms of its impact of state sovereignty.

²⁹⁵ K Von Holdt, M Langa, S Molapo, N Mogapi, K Ngubeni, J Dlamini & A Kirsten *The Smoke That Calls: Insurgent Citizenship, Collective Violence and the Struggle for a Place in the New South Africa: Eight Case Studies of Community Protest and Xenophobic Violence* (2011) 130.

²⁹⁶ For an elaboration, see 26-28.

but *mala fide* in instances where accused could easily have allowed the state the opportunity to help them and chose not to do so.

Now that a working definition of vigilantism has been arrived at for utilisation in the legal context, the focus must shift to the link between vigilantism and legitimacy. This task – which is embarked on forthwith – requires first defining legitimacy, and then explaining the relevance of the existence (or lack thereof) of state legitimacy for understanding vigilantism.

3 CHAPTER THREE: UNDERSTANDING LEGITIMACY

3 1 Introduction

The objective of this chapter is to conceptualise the legitimacy of power in such a way that it can be used to help explain and understand vigilantism. In chapter 2 vigilantism was shown to be a contested and ambiguous concept requiring extensive elucidation before it is capable of use in the criminal justice sphere. The same may be said of legitimacy. Legitimacy is frequently mentioned in vigilantism literature, but such mention is seldom accompanied by an explanation of how the term itself is being used. This is regrettable, since it is not particularly enlightening for a social scientist to declare, for instance, that vigilantes “call into question the ... legitimacy of the state”¹ without spelling out what they mean by state legitimacy. South African courts are no better; an analysis of case law where the term legitimacy is mentioned shows that judges refer to legitimacy in widely disparate senses, making no explicit attempt to define it as a legal concept.²

It is submitted that legitimacy can only be enlisted as a tool to make sense of vigilantism once the elements of this “normative dimension of power relations”³ are distinguished and described, and it is recognised that legitimacy is a multi-dimensional concept that is “dialogic and relational in character”.⁴ This chapter therefore endeavours to clarify the often ill-defined notion of legitimacy, concentrating on identifying and elaborating on aspects of it that are particularly relevant to the vigilante context. It is hoped that a theoretical explanation of the significance of legitimacy for understanding vigilante violence may serve as a foundation for subsequent chapters’ more practically-orientated investigation of the interaction between vigilantism and legitimacy.

¹ Bidaguren & Nina (2004) *Social Justice* 174.

² See § 3 3 1 below.

³ Beetham *Legitimation of Power* x.

⁴ A Bottoms & J Tankebe “Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice” (2012) 102 (1) *The Journal of Criminal Law and Criminology* 119 129.

David Beetham's exposition of the three central components of legitimacy⁵ forms the framework for the chapter's in-depth discussion of the relationship between vigilantism and legitimacy. Beetham identifies three cumulative and complementary aspects of legitimacy required for the justified exercise of power, which will be termed legal legitimacy, normative legitimacy and demonstrative legitimacy respectively. Even though Beetham does not explicitly consider phenomena such as vigilantism in his exposition of legitimacy, his basic approach has been chosen because of its clear structure as well as its powerful explanatory power when making use of legitimacy in the context of vigilante violence. Insights from authors such as Tyler,⁶ Barker⁷ and Bottoms and Tankebe,⁸ as well as relevant case law, are useful supplementary sources for explaining why being legitimated and having legitimacy is so important for those in power – which in the present context could include both the state and vigilantes. The resources mentioned above are drawn upon to substantiate an assumption that there is a “vicious circle”-type link between state performance, legitimacy and a propensity to vigilantism⁹ – a premise that will be explained theoretically later in the chapter, and applied practically in the remainder of the study.

The chapter commences with an account of the significance of legitimacy, and explains the benefits to a power-holder of wielding moral – as opposed to simply *de facto* – authority. Different ways of defining legitimacy are then explored, with a threefold conception of legitimacy being settled on after considering alternative formulations. The bulk of the chapter is devoted

⁵ Beetham *Legitimation of Power*.

⁶ E.g. T R Tyler, A Braga, J Fagan, T Meares, R Sampson & C Winship “Legitimacy and Criminal Justice: International Perspectives” in T R Tyler (eds) *Legitimacy and Criminal Justice: International Perspectives* (2007); T R Tyler & J Jackson “Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement” (2014) 20 (1) *Psychology, Public Policy, and Law* 78; T R Tyler *Why People Obey the Law* (1990); T R Tyler “Procedural Justice, Legitimacy and the Effective Rule of Law” (2003) 30 *Crime and Justice* 283; T R Tyler & Y J Huo *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (2002); J Sunshine & T R Tyler “The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing” (2003) 37 (3) *Law & Society Review* 513; also R Paternoster, R Brame, R Bachman & L W Sherman “Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault” (1997) 31 *Law and Society Review* 163; B Bradford, A Huq, J Jackson & B Roberts “What Price Fairness When Security is at Stake? Police Legitimacy in South Africa” (2014) 8 *Regulation & Governance* 246.

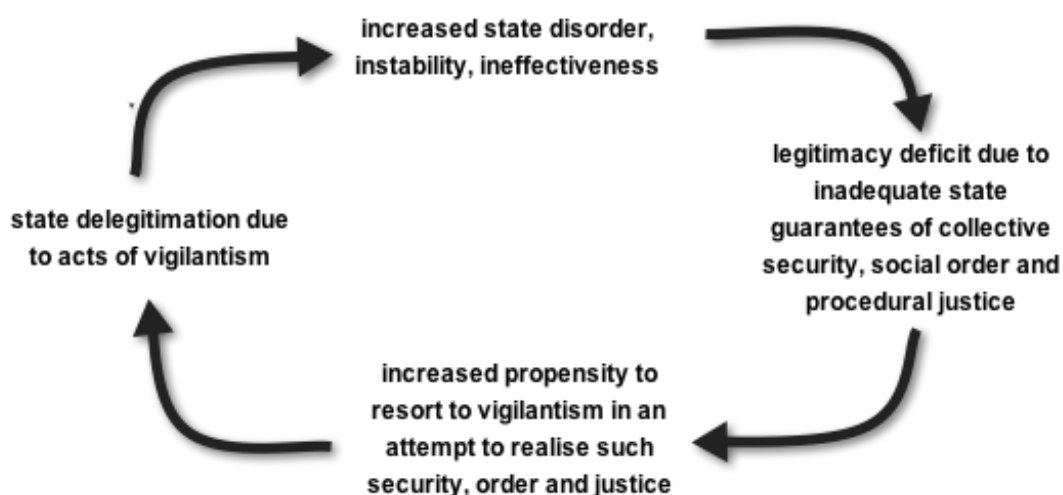
⁷ R S Barker *Legitimizing Identities: The Self-Presentations of Rulers and Subjects* (2001).

⁸ Bottoms & Tankebe (2012) *The Journal of Criminal Law and Criminology*.

⁹ See flow chart below.

to better understanding the legal, normative and demonstrative dimensions of legitimacy, with particular emphasis on their usefulness for explaining vigilantism. It will become clear that for power to be truly legitimate, rule-derived validity must be supplemented by a recognition that power-holders should be able to justify their subjects' duty to obey on moral grounds. This normative aspect of legitimacy conceives of state power as needing to be exercised in such a manner as to fulfil essential societal functions – most notably the duty to guarantee the physical security of its citizens. It will be argued that state failure to promote the common good by administering the criminal justice system competently and fairly risks state legitimacy being eroded. Citizens may then manifest their lack of faith in the state by engaging in acts that demonstrate their non-co-operation, including vigilantism. The chapter concludes by clarifying the link between state performance, state legitimacy and normative compliance, using empirical evidence to substantiate the claim that weakened state legitimacy due to ineffectiveness and a lack of procedural justice makes citizens less inclined to obey and more inclined to violent self-help.

Flow chart illustrating the assumed link between vigilantism and legitimacy¹⁰



3 2 The significance of legitimacy

3 2 1 *More than mere instrumental compliance*

Before embarking on a more detailed analysis of what makes the exercise of power rightful or legitimate, the key question of why power-holders would wish to wield legitimate power must be addressed briefly. Why is moral authority important, in addition to mere *de facto* power? According to Bottoms and Tankebe, power-holders are concerned with “how they can secure the establishment of co-operative social relations making possible the pursuit of collective goals”.¹¹ In the absence of normative incentives inducing obedience it may well be possible to maintain power by using rewards and punishments. However, this implies that a system of power with insufficient coercive tools at its disposal to ensure obedience (such as brute force and/or other means of positive inducement) may risk the complete collapse of its

¹⁰ Adapted from Nel *Crime as Punishment*.

¹¹ Bottoms & Tankebe (2012) *The Journal of Criminal Law and Criminology* 168.

authority.¹² Even if such a dire scenario is avoided, and power is successfully maintained through force alone, without sufficient levels of normative compliance the powerful may have to concentrate all their efforts on simply preserving order, and may have no surplus resources to achieve other goals. The effectiveness of those in power may be severely undermined given such a state of affairs; the degree of their subjects' co-operation determines the quality of performance that the powerful can secure from them; and reluctant subjects who feel no moral obligation to obey are unlikely to perform well. Thus it is in the best interests of the powerful to ensure that their exercise of power is justified, since it will enable them to pursue their own objectives better, as well as to promote the common good.

Thus while it is true that a coercive system of power founded purely on incentives and sanctions motivates co-operation to a degree, there is no doubt that co-operation will be greatly facilitated if there is a normative inducement for subjects to comply, quite apart from instrumental considerations of advantage and prudence. This is where legitimacy fits in; it presupposes that "people relate to the powerful as moral agents as well as self-interested actors"¹³ and forms the basis of a normative foundation for compliance, encompassing the idea that power-holders have a right to rule. Where the exercise of power is legitimate – and perceived to be so – power-holders have the right to expect obedience from their subordinates, and subordinates are correspondingly bound to obey, regardless of their personal views about the content of a particular decision or rule.¹⁴

¹² See Beetham *Legitimation of Power* 28-29. Also Weber *Economy and Society: An Outline of Interpretive Sociology* 213, where he notes that "[p]urely material interests and calculations of advantages as the basis of solidarity between the [dominant and subordinate] result ... in a relatively unstable situation ... [and] do not form a sufficiently reliable basis for a given domination."

¹³ Beetham *Legitimation of Power* 27.

¹⁴ 26.

3 2 2 *Legitimacy and state power*

While what has been said above about the legitimate exercise of power is generally applicable to all sources of authority, there is no doubt that the state's distinctive power to wield or authorise the use of force in the form of physical coercion is "one that both supremely stands in need of legitimation, yet is uniquely able to breach all legitimacy. The legitimation of the state's power is thus both specially urgent and fateful in its consequences."¹⁵ These insights regarding the need for state power to be legitimate – and legitimated – are certainly valid in the criminal justice context. Citizens experience state coercion regularly in the form of encounters with legal authorities such as the police and the courts. It is definitely preferable for state agents not to have to resort to punitive measures to induce obedience, but instead to be able to motivate willing deference to the law, irrespective of whether non-compliance is rendered punishable.¹⁶

As is elaborated on at §§ 3 7 and 4 2 4 below, the hypothesis that when authorities are regarded as legitimate, they are better able to persuade citizens to comply with the law¹⁷ is borne out by a considerable body of empirical research in the criminal justice field. Ground-breaking research by Tyler,¹⁸ confirmed by subsequent research,¹⁹ shows that people tend to be law-abiding for normative rather than instrumental reasons, and also that their belief in the rightfulness of legal authorities is crucially dependent on their being treated with respect and in a manner conducive to procedural justice.²⁰ Such studies confirm a link between legitimacy and normative acquiescence (compliance, co-operation and even community engagement): if citizens view legal authorities as legitimate, they are more likely to defer to them, to trust their decisions about how to resolve problems and to regulate their own

¹⁵ 40.

¹⁶ Tyler & Huo *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* xiii.

¹⁷ Tyler & Jackson (2014) *Psychology, Public Policy, and Law* 78.

¹⁸ Tyler *Why People Obey the Law*.

¹⁹ E.g. Tyler & Huo *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*; Tyler (2003) *Crime and Justice*; Sunshine & Tyler (2003) *Law & Society Review*; T R Tyler "Restorative Justice and Procedural Justice: Dealing with Rule-Breaking" (2006) 62 (2) *Journal of Social Issues* 307; Tyler & Jackson (2014) *Psychology, Public Policy, and Law*.

²⁰ Tyler (2006) *Journal of Social Issues* 308.

behaviour accordingly.²¹ The prospect of citizens responding to legal authorities in a hostile or defiant manner, or resisting their directives and decisions, is also diminished if the police and courts are regarded as legitimate.²²

These findings have been influential, and their insights may form the basis of a new “procedural justice” model of policing in South Africa. The aim of such a model is to focus not merely on (resource-heavy) enforcement of existing sanctions, but rather on treating people fairly, respectfully and in accordance with the values of the Constitution. This was recognised as a potential strategy for combating vigilantism in the findings of Khayelitsha Commission²³ and is considered in more depth in §§ 4 2 6 and 6 2 3 below. Legal authorities such as the police are not the only power-holders vying for legitimacy in the crime-fighting sphere, however. The counter-legitimation strategies of vigilantes are discussed in detail in chapter 5, and chapter 7 considers the question of whether vigilante crime-fighting power necessarily occurs at the expense of the formal criminal justice system, or whether state legitimacy may actually be enhanced by co-opting vigilantes.

By now it should be apparent that (potential) power-holders overlook the significance of the moral rightness of their claims to exercise power²⁴ at their peril. What is still unclear, however, is which factors may contribute towards creating and sustaining legitimacy. What follows is an exposition of various criteria that may aid in establishing whether power relations are legitimate, including an explanation and substantiation of how the term legitimacy is used in the rest of this study.

²¹ See, e.g., Tyler *Why People Obey the Law*; Tyler & Huo *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*; Sunshine & Tyler (2003) *Law & Society Review*; Tyler (2003) *Crime and Justice*; Tyler (2006) *Journal of Social Issues*; Tyler & Jackson (2014) *Psychology, Public Policy, and Law*.

²² Tyler (2003) *Crime and Justice* 286.

²³ O'Regan & Pikoli *Khayelitsha Commission Report* 441-443.

²⁴ Bottoms & Tankebe (2012) *The Journal of Criminal Law and Criminology* 164.

3 3 Defining legitimacy

3 3 1 Legitimacy and the law

South African case law was examined to establish how courts use the word legitimacy. Excluding situations where legitimacy is used in the context of paternity cases, and a few instances where it is used to mean justifiability,²⁵ rationality,²⁶ or legal recognition,²⁷ the most common usage of the term considers legitimacy to be a synonym for conformity to law, or rule-derived validity.²⁸ That legal validity and legitimacy are often used interchangeably is illustrated in *S v Thebus and another*, where Moseneke J states:

“Since the advent of constitutional democracy, all law must conform to the command of the supreme law, the Constitution, from which all law derives its legitimacy, force and validity.”²⁹

In this paradigm, power is legitimate provided its acquisition and exercise are in accordance with established sources of law. For instance, in *Minister of Home Affairs and another v Fourie and another (Doctors for Life International and others, amici curiae); Lesbian and Gay Equality Project and others v Minister of Home Affairs and others*, the court holds:

“The power and duty to protect constitutional rights is conferred upon the courts and courts should not shirk from that duty. *The legitimacy of an order made by the Court does not flow from the*

²⁵ See *South African Veterinary Council and another v Szymanski* 2003 4 SA 42 (SCA), where the idea of a “legitimate expectation” and its requirements were canvassed. Also *National Director of Public Prosecutions v Phillips and others* 2002 4 SA 60 (W).

²⁶ See *Affordable Medicines Trust and others v Minister of Health and others* 2006 3 SA 247 (CC) para 22, where legitimacy was used to refer to a legitimate purpose: “The applicants do not dispute the stated government purpose, or its legitimacy ... That purpose is to increase access to medicines that are safe for consumption. And the legitimacy of this purpose cannot be gainsaid.”

²⁷ See *Bengwenyama-Ya-MaSwazi Community and others v Minister for Mineral Resources and others* 2015 1 SA 197 (SCA) para 32, where the legal recognition or standing of a tribal council was referred to as its “legitimacy”.

²⁸ See, for instance, *Freedom Under Law v National Director of Public Prosecutions and others* 2014 1 SACR 111 (GNP) para 25; *S v Mabaso* 2014 1 SACR 299 (KZP) para 10 & 11; *S v SM* 2013 2 SACR 111 (SCA) para 42; and *De Klerk v Scheepers and others* 2005 1 SACR 475 (T) para 9.

²⁹ *S v Thebus and another* 2002 2 SACR 566 (SCA) para 24.

status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution."³⁰

Similarly, Ackermann J in *De Lange v Smuts NO and others*³¹ notes: "Any normative procedure of a court that does not comply with the rule of law loses its legitimacy".³² While legal validity in this strict sense is certainly a necessary condition for rightfulness of power, it is submitted that it is not a sufficient one. In delineating legitimacy, it has been decided not to limit its definition to a narrow legal one. As is elaborated on below,³³ insights from the domain of social science may be useful in fleshing out the legal concept of legitimacy.

3 3 2 Understanding legitimacy: two approaches from social science

There seem to be two main perspectives in social science literature on how to define legitimacy. The first approach focuses on the responses of subordinates to the decisions and rules of those in authority. Its point of departure is the theorisation of sociologist Max Weber, a central figure where the study of legitimacy is concerned. He defines power relationships as being legitimate because both those in power and those subject to that power believe them to be so.³⁴ According to him:

"Experience shows that in no instance does domination voluntarily limit itself to the appeal to material or affectual or ideal motives as

³⁰ *Minister of Home Affairs and another v Fourie and another (Doctors for Life International and others, amici curiae); Lesbian and Gay Equality Project and others v Minister of Home Affairs and others* 2006 1 SA 524 (CC) para 171 (emphasis added).

³¹ *De Lange v Smuts NO and others* 1998 3 SA 785 (CC) para 137.

³² For other examples of courts using legitimacy in this narrow sense, see *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) para 18; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and others* 2009 2 SACR 130 (CC) para 221; *National Director of Public Prosecutions v Rautenbach and others* 2005 1 SACR 530 (SCA) para 42; *S v Manamela and another (Director-General of Justice intervening)* 2000 1 SACR 414 (CC) para 61; *S v Coetzee and others* 1997 1 SACR 379 (CC) para 86; *President of the Republic of South Africa and another v Hugo* 1997 1 SACR 567 (CC) para 103; *S v Zuma and others* 1995 1 SACR 568 (CC) para 19; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 250; and *S v Makwanyane and another* 1995 3 SA 391 (CC) paras 175 & 198.

³³ At § 3 3 2.

³⁴ Weber *Economy and Society: An Outline of Interpretive Sociology* 213.

a basis for its continuance. In addition every such system attempts to establish and cultivate *the belief in* its legitimacy.”³⁵

Many social scientists follow his lead in equating legitimacy with a belief in legitimacy. For instance, Tyler and Huo, in the criminological context, define legitimacy as

“the belief that ... authorities are entitled to be obeyed and that the individual ought to defer to their judgments ... Legitimacy is a value in the sense that it is a feeling of obligation or responsibility that leads to self-regulatory behavior – that is, voluntarily bringing one’s behavior into line with the directives of those authorities one feels ought to be obeyed.”³⁶

In the same vein, Tyler views a legitimate authority as “an authority regarded by people as entitled to have their decisions and rules accepted and followed by others”.³⁷ Once again, the focus is on the recognition of the authority as being legitimate (“regarded by people”), as opposed to the basis upon which people choose to afford it legitimacy. Sunshine and Tyler, too, emphasise the consequences of legitimacy rather than the reasons why a particular institution is labelled legitimate: “Legitimacy is a property of an authority or institution that leads people to feel that authority or institution is entitled to be deferred to and obeyed.”³⁸ The practical and normative consequences of believing an authority to be legitimate are a key component of Tyler *et al*’s exposition of legitimacy:

“When people are influenced by an authority or institution not by means of the use of power but because they believe that the decisions made and rules enacted by that authority or institution

³⁵ 212-213.

³⁶ Tyler & Huo *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* xiv.

³⁷ Tyler (2003) *Crime and Justice* 307.

³⁸ Sunshine & Tyler (2003) *Law & Society Review* 514.

are in some way ‘right’ and ‘proper’ and ought to be followed, then that authority is perceived as legitimate.”³⁹

The first approach, then, focuses on citizen belief in legitimacy, as well as the practical implications of such a belief – i.e., that citizens are more normatively inclined to obey a legitimate authority than one that lacks legitimacy.

A second approach – exemplified by Beetham⁴⁰ – criticises this conflation of a belief in legitimacy with legitimacy itself. Beetham’s contention is that Weber’s influence on the subject of legitimacy from a social science perspective “has been an almost unqualified disaster”, resulting in the issue of legitimacy focusing on the beliefs people hold about a system of power, instead of its actual characteristics.⁴¹ A Weberian definition of legitimacy reduces it from a complex of factors which give people good ground for compliance, to a single dimension: belief in legitimacy.⁴² To counter this, Beetham proposes what he considers to be a more nuanced alternative definition of legitimacy. He defines it as the rightfulness of power, focusing not on belief in legitimacy as such, but on whether feeling obliged to obey is justifiable on normative grounds.⁴³ He argues that to establish legitimacy, it is necessary to assess whether there is congruence between a given system of power and the grounds or reasons providing its justification, rather than simply establishing whether subordinates believe it to be legitimate.⁴⁴ Bottoms and Tankebe agree that the fundamental legitimacy question concerns the “right to rule”, formulating it as “whether a power-holder is *justified in claiming the right to hold power* over other citizens”.⁴⁵ They quote with approval Coicud’s definition of legitimacy as “the recognition of the right to govern. In this regard, [legitimacy] tried to offer a solution to the fundamental political

³⁹ Tyler, et al. “Legitimacy and Criminal Justice: International Perspectives” in *Legitimacy and Criminal Justice: International Perspectives* 10.

⁴⁰ Beetham *Legitimation of Power*.

⁴¹ 9.

⁴² See 6-25 for an elaboration on his criticism of Weber.

⁴³ 26.

⁴⁴ 6-11.

⁴⁵ Bottoms & Tankebe (2012) *The Journal of Criminal Law and Criminology* 124-125.

problem, which consists in justifying simultaneous political power and obedience”.⁴⁶

In the present context, where the concept of legitimacy is used as a framework for the better understanding of vigilantism, this second approach to defining legitimacy is preferable: First, it better emphasises legitimacy’s normative character, in that the rightful exercise of power is recognised as being the basis for a moral obligation to obey.⁴⁷ Second, by highlighting that legitimacy “simultaneously justifies the actions of both the power-holder and the obedient subject”,⁴⁸ it recognises the multi-dimensionality⁴⁹ of legitimacy, and that it involves an ongoing interactive relationship between those in power and their subjects. Third, it acknowledges the contingent nature of legitimacy; since the sense of obligation to obey that legitimacy invokes is conditional on the rightfulness of the power being exercised, subordinates may withdraw recognition of power-holders’ right to rule under certain circumstances. Thus the legitimacy of those in power “is not something given or unalterable”,⁵⁰ but is constantly in flux.⁵¹ As noted by Lund,⁵² “[w]hat is legitimate varies between and within cultures and over time, and is continuously (re-) established through conflict and negotiation.” This supports Barker’s conceptualisation of legitimacy as “an active, contested political process, rather than ... an abstract political resource. Since it is an activity, not a property, it involves creation, modification, innovation and transformation.”⁵³

Keeping in mind the normative,⁵⁴ relational and dynamic nature of legitimacy, it is now necessary to look more closely at its components, using Beetham’s framework⁵⁵ as a point of departure. What follows is an examination of each of Beetham’s legitimacy dimensions – legal, normative

⁴⁶ 125.

⁴⁷ Beetham *Legitimation of Power* 26; Bottoms & Tankebe (2012) *The Journal of Criminal Law and Criminology* 125.

⁴⁸ Bottoms & Tankebe (2012) *The Journal of Criminal Law and Criminology* 125.

⁴⁹ Beetham *Legitimation of Power* 15.

⁵⁰ 258.

⁵¹ Bottoms & Tankebe (2012) *The Journal of Criminal Law and Criminology* 152.

⁵² Lund (2006) *Development and Change* 693.

⁵³ Barker *Legitimizing Identities* 28.

⁵⁴ See chapter 1 n 39 for a definition of how the term “normative” is used in this study.

⁵⁵ Beetham *Legitimation of Power*.

and demonstrative – including a brief preliminary examination of their implications for vigilantism.

3 4 Legal legitimacy

The first level of legitimacy, that of rule-derived validity, corresponds with the legal definition of legitimacy already discussed. To be *prima facie* legitimate, power must be acquired and exercised in accordance with established rules.⁵⁶ Such “rules of power”⁵⁷ may be formalised in legal codes (such as a supreme Constitution in the case of South Africa) and/or court judgments, but may also be unwritten, informal conventions. Beetham distinguishes three different means of power which mutually reinforce each other and together provide the basis for relations of dominance and subordination: The first is the possession of material resources (the means of production and subsistence, as well as the instruments of physical force or coercion); the second is the control of socially necessary activities and the skills associated with their performance (the division of labour); and the third is the occupancy of positions of authority or command.⁵⁸ It is rules (or laws) of access and exclusion that transform these key resources, activities and positions into a means of social power, with corresponding relations of dominance and subordination.⁵⁹ According to Beetham, these rules of power and exclusion both constitute power and legitimate it, in that they “confer the rights on the powerful to require others to respect the exclusiveness which is the basis of their power.”⁶⁰

Since established rules provide “both the source and protection of their power”, power-holders have a vested interest in portraying such rules as the “ultimate, rather than merely [the] proximate” source of legitimacy.⁶¹ Those in

⁵⁶ See also Weber *Economy and Society: An Outline of Interpretive Sociology* 215, where he identifies as one of the “pure types of legitimate domination” “a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority)”. Note that he focuses on the *belief* in the rules’ legality as opposed to their rule-derived validity itself.

⁵⁷ Beetham *Legitimation of Power* 16.

⁵⁸ 47-50.

⁵⁹ 56.

⁶⁰ 56.

⁶¹ 67.

power tend to employ solemn rituals of self-legitimation with the objective of reinforcing respect for rules of power by “sanctifying” power-holders’ moral authority. Beetham identifies a number of features inherent in formal legal systems that aim to impart an aura of inviolability not just to the abstract idea of the law itself, but also to its substance, thus concealing the contingent nature of its content.⁶² These include the way that everyday language distinguishes between what is legally permitted and what is criminal – describing the taking of property as “redistribution” or “expropriation” rather than “theft”, for example, though the difference in practice may be quite arbitrary. Another manifestation of this presentation of the law as a “morally edifying spectacle or theatre” is the “weighty anathemas pronounced against those who infringe [the law]”.⁶³ The formalities and traditions associated with the courtroom, and the denunciation of those who show disrespect towards them⁶⁴ unquestionably contribute to the state’s depiction of its exercise of power as sacrosanct and exalted (and hence legitimate). As will become clear in chapter 5,⁶⁵ vigilante methods of self-legitimation frequently echo those of the state. Vigilantes also attempt to differentiate their actions from “illegitimate” criminal conduct, and mimic the forms and rituals of criminal punishment to justify their exercise of power as being comparable, but superior, to that of formal law-enforcement.

The more those who derive their power from the established law attribute an exalted status to the law, appealing to it as the “self-sufficient justification for their power”,⁶⁶ the more they must respect it themselves for their power to be sustained. Legitimate power is limited power.⁶⁷ Most states (including South Africa) subscribe to the notion that power-holders should not consider themselves to be above the law in the exercise of their functions, but

⁶² In this regard, see also Douglas *How Institutions Think* 45; 52; 112, who says that a “naturalizing principle” is required to “confer the spark of legitimacy” – i.e., that rightness of power requires an institution to provide its members with a “set of analogues” that “justify the naturalness and reasonableness of the instituted rules”.

⁶³ Beetham *Legitimation of Power* 67.

⁶⁴ For example, by criminalising contempt of court.

⁶⁵ Particularly in §§ 5 2 1 and 5 4 1 1.

⁶⁶ Beetham *Legitimation of Power* 68.

⁶⁷ 35.

bound by it.⁶⁸ By subjecting themselves to the constraining mechanism of this “rule of law”, power-holders are demonstrating their commitment to preventing the arbitrary exercise of power, which in turn validates their right to rule. The rule of law is thus a factor simultaneously limiting and guaranteeing their power.⁶⁹ It is unsurprising, then, that empirical studies have found a strong link between procedural justice (which would include respect for the principle of legality) and perceptions of state legitimacy.⁷⁰ Where power-holders fail to respect the rule of law – that is, by acquiring power in contravention of the established rules of power, or by exercising their power by breaching or exceeding those rules – legal validity is absent and subsequent exercise of power is illegitimate.⁷¹

Legal legitimacy in the sense of rule-derived validity elucidated above is thus a necessary condition for the justified exercise of power – although, as will be demonstrated in due course, not a sufficient one.

3 4 1 Do acts of vigilantism impact on legal legitimacy?

Now that legal legitimacy has been explained, it must be considered whether vigilantism itself poses a threat to such rule-based validity. Some writers seem to imply that vigilantes’ lack of respect for the law does indeed undermine legal legitimacy, suggesting that vigilante movements “hav[e] turned partly into promoters of sedition against the state”.⁷² Is it accurate to describe vigilante groups as being seditious – having the intention to “[impair] the authority of the state by defying or subverting the authority of its government”?⁷³ To arrive at an answer, it must be determined whether

⁶⁸ This idea of the rule of law, which incorporates such mechanisms as the separation of powers, is known as the principle of legality in the criminal justice context. The crux of the principle of legality is *nullum crimen sine lege*, or “no crime without a law”. For more on the principle of legality, see Snyman *Criminal Law* 35-49 and Burchell *Principles* 33-44.

⁶⁹ Beetham *Legitimation of Power* 68.

⁷⁰ For more, see particularly §§ 3 2 1, 3 7 and 4 2 6, as well as the empirical studies cited there.

⁷¹ See Beetham *Legitimation of Power* 206-207.

⁷² Bidaguren & Nina (2004) *Social Justice* 174.

⁷³ This is the definition of sedition in Burchell *Principles* 825. There is some dispute about whether violence, or the threat of violence, is an element of this crime. According to Roman Dutch authorities “oproer” – which implies a tumult or a stirring-up – was a requirement. More recent case

vigilantes really do intend to challenge or impair the authority of the state, and what defiance of governmental authority means in this context.

The case of *S v Zwane*,⁷⁴ an apartheid-era vigilante-type scenario, is instructive in this regard. A number of accused were charged with sedition for having participated in the holding of People's Courts, where alleged wrongdoers were summoned or intimidated to appear, summarily tried, a decision reached, and punishment imposed and immediately administered, usually in the form of lashes with a sjambok. Furthermore, it was alleged that they had prevented and discouraged residents of Alexandra from taking their complaints to the police instead of the People's Court, and had punished them for doing so.⁷⁵ An objection was raised in *S v Zwane (1)* that the holding of a People's Court did not amount to challenging the authority of the state, since state authority refers to state *majestas*, or the executive arm of government, while the accused's holding a People's Court had merely defied the judicial organs of state.⁷⁶ This contention was rejected, with the court finding that subjecting people to an "unlawful judicial system" was indeed in defiance of state *majestas*. As authority, the court cited *R v Christian*,⁷⁷ where Innes CJ described a state's "internal" *majestas*, holding that the power of making and enforcing laws "is essential to the very existence of the State".⁷⁸ This was confirmed in *S v Zwane (3)*, where, when the case finally came to court, the accused were charged not only with sedition (i.e., with challenging the state's authority) but also with high treason.⁷⁹ Grosskopf J held:

law – specifically *S v Zwane (1)* 1987 4 SA 369 (W) 374F-I held that an unlawful gathering "in defiance of the authorities and for an unlawful purpose" amounted to sedition, even if not accompanied by violence or threats thereof. Snyman *Criminal Law* 310 rejects this approach on the grounds that peaceful gatherings would then be transformed into sedition merely because they were unlawful or aimed against the government. A "reasonable interpretation" of our authorities, he contends, is that real or threatened violence is a requirement. Burchell *Principles* 827 agrees that the finding in *Zwane (1)* contradicts the traditional understanding of sedition. However, since vigilantism as defined for present purposes implies violence or the threat of violence, this debate need not detain us.

⁷⁴ *S v Zwane (1)*; *S v Zwane (3)* 1989 3 SA 253 (W).

⁷⁵ *S v Zwane (1)* 373D; *S v Zwane (3)* 255B-C.

⁷⁶ *S v Zwane (1)* 375B-D.

⁷⁷ *R v Christian* 1924 AD 101 at 106.

⁷⁸ *S v Zwane (1)* 375G-376D.

⁷⁹ High treason is committed by a person who owes allegiance to a state unlawfully engaging in any overt act "with intent to overthrow, impair, violate, threaten or endanger the existence, independence

“[U]nlawful acts which are aimed at endangering or coercing the judicial authority of the State in particular may very well be treasonable acts, provided they are committed with the necessary intent to impair the *majestas* of the State.”⁸⁰

However, the accused were acquitted of high treason, since the prosecution was unable to prove the required “hostile intent” – intent to overthrow or coerce the government, in other words. The court held that subversion of the state had not been contemplated by the accused; nor was their object to “compel the Government to obey their behests”, and instead they were convicted of the lesser charge of sedition.⁸¹

What may be inferred from this case regarding legal legitimacy (or lack thereof) and vigilantism? It is submitted that only if the actions of vigilantes amount to high treason may vigilantism be regarded as posing a threat to legal legitimacy *per se*. Undermining a state’s legal legitimacy (the right to rule in the narrow sense of rule-derived validity) would indeed be tantamount to questioning the very right to existence of the state itself, which is at the heart of the crime of high treason. The contention that vigilantes do not recognise the authority of the government is made tangentially in *Chief Lesapo v North West Agricultural Bank and another*, where Mokgoro J declared: “The right of access to court is a bulwark against vigilantism, and the chaos *and anarchy* which it causes.”⁸² Vigilantes are not truly anarchists or traitors, however. Abrahams argues persuasively that, while vigilantism has the potential for subversion, “it commonly displays a non-revolutionary and even a reactionary character”.⁸³ Indeed, it may be contended that engaging in acts of vigilantism presumes the existence of the state, and that state legitimacy in this first sense of legal legitimacy is a necessary prerequisite for vigilantism. In a similar vein, Buur describes the vigilante challenge to the state as confirming the state’s existence, rather than having

or security of the state, or to overthrow it or to coerce the government of the state or change the constitutional structure of the state” (Burchell *Principles* 814; also Snyman *Criminal Law* 299).

⁸⁰ *S v Zwane* (3) 260A.

⁸¹ 317J-318A.

⁸² *Lesapo v North West Agricultural Bank* para 22 (emphasis added).

⁸³ Abrahams *Vigilant Citizens* 4.

the objective of undoing the state or establishing a different state. Vigilantes' undermining of the state is instead "directed at rectifying state practices and modes of being" with the aim being that there should be "more state, not less state."⁸⁴ He opines that "when vigilante groups do emerge this seldom represents a rejection of the idea of a state or political order; rather, it represents an attempt to reconstitute or redefine a political order in a 'purer' form."⁸⁵ As is detailed below, vigilantes appear to be in the paradoxical position of respecting the law both too much and not enough. On the one hand, they demand efficient enforcement of the law, implying that they acknowledge its authority, while on the other, they are prepared to flout the law by acting as state substitutes to compel others to comply not only with formal law, but also with their own political, religious, cultural or moral beliefs.⁸⁶

The contention that vigilante conduct is not treasonous is bolstered if vigilante activities are compared to those of guerrillas or resistance movements, the latter being radical critics of the state who do indeed contest the right of a particular regime to exist, and whose primary objective is to mount a subversive political offensive against those currently in power.⁸⁷ In contrast, despite the fact that vigilantes are critical of state performance and seek to appropriate certain government functions relating to the enforcement of certain institutionalised norms, albeit on a limited and temporary basis, the agenda of vigilantism is not first and foremost political or revolutionary. Vigilantes focus on (re-)establishing and maintaining social order and collective security, rather than on overthrowing those in power or challenging the regime or rulers in their entirety.⁸⁸ The absence of an explicit political motive is also one of the features that distinguish vigilantism from terrorism.⁸⁹

⁸⁴ Buur (2006) *Development and Change* 750.

⁸⁵ Buur "Domesticating Sovereigns" in *Domesticating Vigilantism in Africa* 46.

⁸⁶ Barker *Legitimizing Identities* 89.

⁸⁷ Abrahams *Vigilant Citizens* 168.

⁸⁸ See Barker *Legitimizing Identities* 102; C B Little & C P Sheffield "Frontiers and Criminal Justice: English Private Prosecution Societies and American Vigilantism in the Eighteenth and Nineteenth Centuries" (1983) 48 *American Sociological Review* 796.

⁸⁹ See Monaghan (2004) *Low Intensity Conflict and Law Enforcement* for a discussion distinguishing vigilantism from terrorism, and her assessment of whether the vigilante organisation PAGAD has made the shift from the former to the latter.

However, the implication of the court in *Zwane* (3) characterising the vigilante act of holding People's Courts as a form of sedition, even if not high treason, is that vigilantes do undermine or challenge certain aspects of state legitimacy to a significant degree, even while acknowledging the state's legal legitimacy. As is explained further when the remaining dimensions of legitimacy are examined, legitimacy also entails that any exercise of power should promote the common good, including (most salient for present purposes) the state ensuring the physical security of its inhabitants. In this paradigm, vigilante violence may be understood as the conduct of a "conservative mob" that "[thrives] on the idea that the state's legitimacy at any point in time depends on its ability to provide citizens with the levels of law and order they demand".⁹⁰ While engaging in vigilantism cannot be said to signify rejection of the concept of the state itself as illegitimate, vigilantes clearly regard the duty to respect the law not as absolute, but merely contingent on the state fulfilling its duties in respect of securing personal safety. Herein lies their challenge to state legitimacy and their "seditious" usurpation of state power:⁹¹ they defy the state's would-be exclusive authority to enforce its laws (by means of the official, lawful judiciary, police, prosecuting and other authorities)⁹² and instead impose their own violent form of social control, thus laying temporary claim to the "state's own mantle of authority"⁹³ in the criminal justice sphere.

Despite the findings in *Zwane* 3, whether this kind of vigilante undermining of state legitimacy is serious enough to be viewed as sedition is highly debatable. It must be remembered that *Zwane* 3 was decided in the height of the apartheid era, when any opposition to state authority tended to be viewed in an extremely serious light.⁹⁴ As explained in chapter 1, the aim

⁹⁰ Abrahams *Vigilant Citizens* 4.

⁹¹ A Minnaar "The 'New' Vigilantism in Post-April 1994 South Africa: Searching for Explanations" in D Feenan (eds) *Informal Criminal Justice* (2002) 129. It must be emphasised that even if one acknowledges the authority of the *Zwane* perspective that most vigilantism technically amounts to sedition, it is submitted that it does not necessarily follow that (all) vigilantism ought to be regarded as sedition, especially considering that vigilantes justify their conduct as a necessary reaction to state failure to provide satisfactory assurances of collective security and social order.

⁹² Snyman *Criminal Law* 310.

⁹³ Abrahams *Vigilant Citizens* 9.

⁹⁴ For an enlightening analysis of the treason trial of members of a People's Court (the Alexandra Action Committee), see R L Abel *Politics by Other Means: Law in the Struggle Against Apartheid*

of People's Courts in the 1980's was in any event not primarily to advance order and physical security, but rather to suppress by violence those perceived to be in league with apartheid authorities. It is submitted that the *Zwane* 3 reasoning about vigilantism as seditious is thus unconvincing in the context of the present era of constitutionalism: the accused's chiefly political motivations make it doubtful whether their conduct falls within the purview of the definition of vigilantism proposed here. Significantly, as far as could be ascertained there are no post-1994 incidences in South Africa where those involved in vigilante-type activities were charged with sedition.

If it does not amount to sedition, in what way does vigilantes' appropriation of an important aspect of the state's power (that of "law-enforcement") undermine state legitimacy, despite vigilantes recognising the state as legitimate in the strict legal sense? To grasp how a state can possess legal legitimacy yet still exercise power in a less than legitimate fashion, it must be recognised that legal legitimacy cannot be an exclusive criterion for legitimacy. To understand why legal legitimacy is a necessary, but not sufficient, condition for the valid exercise of authority, it is necessary to return to an aspect mentioned in passing earlier, namely the contingent, arbitrary nature of many legal rules. While established rules are a necessary first step for the rightfulness of power, they "cannot justify themselves simply by being rules",⁹⁵ but are in need of justification with reference to norms or sources that lie beyond them.⁹⁶ Fundamental underlying issues include the following: Why are these particular laws or rules, and not others, used to govern the social order? What gives them their legitimacy? And how may their legitimacy be eroded? These considerations, including their implications for vigilantism, are explored next.

(1995) 311-383, where the factual background and details that were at issue in *S v Mayekiso and others* 1988 4 SA 738 (W) are considered.

⁹⁵ Beetham *Legitimation of Power* 69.

⁹⁶ See also Douglas *How Institutions Think*.

3 5 Normative legitimacy

As already noted, Beetham argues that the *de facto* power flowing from legal validity, and the corresponding generalised duty to respect the law, is a necessary but insufficient condition for legitimacy: the differential and inherently coercive exercise of authority that characterises all power relationships – its implied exclusion, restriction and compulsion – must also be morally justifiable.⁹⁷ The various aspects of normative legitimacy, as well as the negative features of the dominant-subordinate relationship justified by each, are discussed below.

3 5 1 *Legitimacy and authoritative sources of power*

For power rules to be justifiable, they need to be derived from an “ultimate source which validates society’s rules and system of law”.⁹⁸ This authoritative source (which may be popular will, tradition, a written constitution, etc.) has a special significance for the legitimacy of political power, since there is no positive law beyond it to which it can appeal for its own validation.⁹⁹ Where there is divergence between the existing constitutional order and accepted beliefs about the proper source of its political authority, a legitimacy deficit may result. Such a “legitimacy gap” occurs, then, where there is a discrepancy between the constitutional rules imposed and the beliefs providing their justification, such that the rules of power are left unsupported due to a lack of appropriate beliefs. Beetham notes that beliefs underpinning sources of authority deemed to be valid tend to decay when changes within a society reveal “that what had previously been assumed to be a ‘natural’ form of social organisation ... is in fact socially constructed.”¹⁰⁰ He also observes that the particular legitimating ideas and justificatory principles underpinning each institution of power “define which

⁹⁷ Beetham *Legitimation of Power* 57-59.

⁹⁸ 70.

⁹⁹ 70.

¹⁰⁰ 109.

challenges the ruler has to take most seriously, because they strike at the basis of the system of rule itself".¹⁰¹

These insights about the justifiability of power rules based on their having an authoritative source already reveal the potential for a state legitimacy deficit in the vigilante context. It is unlikely to be coincidental that rapid and profound societal transition should provide an atmosphere conducive to the appearance or expansion of vigilantism.¹⁰² Buur notes that "vigilantism seems to gain prevalence and to emerge or radicalise in times of great social upheaval, when an anticipated future has been abruptly yanked away or is under threat."¹⁰³ As was mentioned above, Beetham suggests that a state must protect most fiercely from challenge the values underlying its ultimate source of law. In a country like South Africa, which has had a profound shift in valid source of authority from effectively being an oligarchy to being a democracy with a justiciable and supreme Constitution, the state's primary duty would now be to uphold and enforce those values and interests underlying the new constitutional democracy, namely human rights. Ironically, it may well be a newly democratic state's change from draconian, repressive and heavy-handed law-enforcement towards more accountable, transparent and human-rights-friendly policing that triggers vigilantes to take the law into their own hands. There are various explanations for this, which are considered in detail in chapter 4.

A key theme in accounts explaining the link between political transition to democracy and vigilantism is that vigilantism is justified as "a divergence from, and a disagreement with, a human rights framework".¹⁰⁴ The sluggish progression of cases through the criminal justice system, the too-easy granting of bail and the abolition of the death penalty are just a few of the grievances mentioned by vigilantes and their sympathisers, illustrating the incompatibility of their mindset with that of a state committed to the promotion

¹⁰¹ 36.

¹⁰² M Kucera & M Mares "Vigilantism During Democratic Transition" (2015) 25 (2) *Policing and Society* 170 182; Little & Sheffield (1983) *American Sociological Review* 797; M Supancic & C L Willis "Extralegal Justice and Crime Control" (1998) 21 (2) *Journal of Crime and Justice* 191 195.

¹⁰³ L Buur "Democracy and its Discontents: Vigilantism, Sovereignty & Human Rights in South Africa" (2008) 35 (118) *Review of African Political Economy* 571 582.

¹⁰⁴ Harris *As for Violent Crime That's Our Daily Bread* 37.

of human rights. In South Africa, the vigilantes' alternative narrative is based on "tradition", "culture" and "custom". These are presented as being hostile – and superior – to the "criminal-friendly" "western" system of justice, and are used to justify the violent punishment methods that are labelled as vigilantism from South Africa's constitutional perspective. To use Beetham's terminology, the source of these vigilantes' criminal justice authority is society in the past (what he terms the "sanctification of tradition"),¹⁰⁵ while the South African state regards society in the present ("the people", whose wishes are purportedly embodied in a supreme Constitution) as the authoritative source of criminal justice rules. It may well be that the South African state's attempt to "impose new rules of [criminal justice] power in a context where the appropriate beliefs are lacking"¹⁰⁶ is one of the reasons for the legitimacy gap which vigilante crime-fighters are so willing to fill. The implications of incompatible state and citizen crime-fighting sources of authority for state legitimacy, as well as possible ways for the state to enhance the congruency between its legal rules and the popular beliefs sustaining them, are detailed below in chapters 4, 6 and 7.

Interestingly, while there may be a legitimacy gap between the criminal justice beliefs of vigilantes and those of the state, the apparent increase in vigilantism may conversely also be a product of new labelling due to more positive perceptions about state legitimacy brought on by political transition. Conduct which under an illegitimate regime was described as "crime-fighting" is now pejoratively branded as "vigilantism" in the setting of a newly-legitimate¹⁰⁷ political regime. According to Harris, "vigilantism occurs in a legitimate political climate, while 'crime-fighting' originates under an illegitimate order".¹⁰⁸ This is well illustrated by a passage from her research into vigilante violence in South Africa:

¹⁰⁵ Beetham *Legitimation of Power* 74.

¹⁰⁶ 75.

¹⁰⁷ In the sense of legal legitimacy explained above.

¹⁰⁸ Harris *As for Violent Crime That's Our Daily Bread* 5.

“[Interviewer]: Is [vigilantism] a new phenomenon in Mamelodi?”

[Respondent]: Yes, it is a new phenomenon, though the history of Mamelodi tells us something, for instance, the period before the elections, the democratic elections, Mamelodi at some stage was a no-go area for the police. People were dealing with crime themselves, so, as a result, people have it in their mind that if they themselves can deal with crime privately, they can bring the crime level to zero level.

[Interviewer]: So has there been any change regarding the nature of vigilantism since around the elections?

[Respondent]: What actually, I’ve mentioned before is that at that point in time, one cannot call that vigilantism, before the elections. It was just a community dealing with crime. But at this stage, what has happened with this kangaroo court, that is the phenomenon today.”¹⁰⁹

This excerpt shows what seems to be an inverse relationship between the apparent legitimacy of the political order and vigilantism. What is being described is not merely a semantic shift. In the opinion of this interviewee, the new regime’s being legitimated by popular will (the state having shifted to a source of legitimacy perceived as authoritative, in other words) has actually transformed what was (justified) crime-fighting to (unjustified) vigilantism. This insight may have significant implications for the state’s efforts to curb vigilantism. If the community no longer buys into the vigilante rhetoric of “heroic crime-fighting” due to greater perceived state legitimacy, community members may be less inclined to legitimate vigilante violence at the expense of the legitimacy of the state. Ways in which the state might counter the impact of vigilantes’ symbolic power are considered at § 6 3 1 below.

¹⁰⁹ 30-31.

3 5 2 *Legitimacy as justifiable rule-content*

Now that the importance for normative legitimacy of demonstrating an authoritative source for the rules of power has been discussed, the key question raised above, namely, “why these rules?”, needs addressing. Beetham¹¹⁰ answers this question by focusing on two distinct elements. First, the inequality of circumstance between those in power and those subject to it needs to be explained in terms of a *principle of differentiation* that justifies the distinctions between the dominant and the subordinate. Second, there needs to be a *principle of community or common interest* linking the dominant and the subordinate, demonstrating that the subordinate as well as the power-holder derive advantage from the rules of power. According to Beetham, and as is explained further below, the primary purpose of the principle of differentiation is to justify their power to the power-holders themselves, while the principle of common interest serves to justify power-holders’ power to their subordinates.

3 5 2 1 *Principles of differentiation and self-justification*

Max Weber noted that “the continued exercise of every domination always has the strongest need of *self-justification* through appealing to the principles of its legitimation”.¹¹¹ For power to be legitimate, it is necessary that the rules of power demonstrate that the subordinates’ exclusion from essential resources, activities and positions is “not arbitrary or fortuitous, but is based on a normative distinction of superiority and inferiority”.¹¹² Barker’s analysis of legitimacy focuses predominantly on this issue: how those who exercise power are able to persuade (primarily) themselves that they are “special, marked by particular qualities, set apart from other people”.¹¹³ Barker distinguishes between the idea of legitimacy as an ascribed attribute,

¹¹⁰ Beetham *Legitimation of Power* 76-77.

¹¹¹ M Weber *Economy and Society* (1978) quoted in Beetham *Legitimation of Power* 225.

¹¹² Beetham *Legitimation of Power* 59.

¹¹³ Barker *Legitimizing Identities* 35.

on the one hand, and legitimation as the act that ascribes such legitimacy, on the other. According to him:

“[Legitimation] is a claim or expression made by or on behalf of that person to assert the special or distinctive identity which that person possesses, which identity justifies or authorises or legitimates the command by legitimating the person issuing it. It is in the first place persons not systems, rulers not regimes, who are legitimated.”¹¹⁴

Barker suggests that social science research on the rightfulness of power would benefit from emphasising legitimation rather than legitimacy; investigating the ways in which legitimation takes place in a society rather than asking whether that society is legitimate *per se*.¹¹⁵ Beetham does not dispute that investigating claims to legitimacy forms the starting-point of any enquiry, but – correctly it is submitted – he argues that these legitimations must also be acknowledged or accepted by subordinates for the exercise of power to be legitimate.¹¹⁶

On what basis do power-holders cultivate a self-identity confirming the “deservedness” of their power that legitimates their “distinguishing, specific monopoly of the right to rule”?¹¹⁷ To answer this, the principles relied on to justify the differentiation between dominant and subordinate must be scrutinised. As has already been noted, such principles aim to demonstrate that those in power possess qualities lacking in their subordinates, and moreover, that these qualities “are appropriate to the particular form of power that is exercised” and render the inequality of powers and life-choices morally acceptable.¹¹⁸ Beetham distinguishes between two groups of justifying principles demonstrating “rightful authorisation”:¹¹⁹ Ascription theories, which assume that the qualities appropriate for the exercise of power are assigned

¹¹⁴ 32.

¹¹⁵ 24-25.

¹¹⁶ Beetham *Legitimation of Power* 225.

¹¹⁷ Barker *Legitimizing Identities* 24.

¹¹⁸ Beetham *Legitimation of Power* 77; 60.

¹¹⁹ xiii.

at birth; and meritocratic theories, which hold that such qualities may be demonstrated only through performance and achievement.¹²⁰

With regard to ascription, power rules relating to heredity and aristocracy, as well as gender and race, have been influential throughout history in justifying the differentiation of influence and circumstance. Tellingly, Beetham remarks that the legitimation of power rules not only assists in developing and disseminating an appropriate ideology (the idea that someone is “born to rule”, for instance, or the view of women as the “weaker sex”), but also aims to construct a “social identity by a complex set of often unconscious processes, which make that identity seem ‘natural’, and give the justifying ideas their plausibility”.¹²¹ That this so-called “naturalness” is actually socially constructed is starkly demonstrated by infamous attempt of the apartheid government’s Hendrik Verwoerd to legitimise the limiting of black students’ academic curriculum to basic literacy and numeracy, on the grounds that Africans were meant to be “hewers of wood and drawers of water”.¹²²

An alternative to utilising ascriptive theories to justify power differentials is to employ the principle of meritocracy, which assumes that those who gain access to power are indeed the most worthy it, and have demonstrated achievement in order to attain it.¹²³ An underlying prerequisite for an effective meritocracy is equality of opportunity, as well as a basic presumption of non-discrimination on irrelevant grounds (i.e., a presumption of equality).¹²⁴ While meritocratic rules appear to be superior to ascriptive ones in theory, and lip-service is commonly paid to meritocratic principles to justify the acquisition of power (e.g., “he is the best man for the job”), Beetham warns that in practice it is almost impossible to “break out of the self-fulfilling cycle of legitimation, characteristic of ascriptive societies, whereby natural-seeming qualities are socially created”.¹²⁵ Indeed, even if a pure meritocracy could be realised, it would only serve to justify why a particular kind of individual should have

¹²⁰ 77.

¹²¹ 78.

¹²² Anonymous “Hendrik Frensch Verwoerd” (2012-07-12) *South African History Online* <<http://www.sahistory.org.za/people/hendrik-frensch-verwoerd>> (2015-02-23).

¹²³ Beetham *Legitimation of Power* 80.

¹²⁴ 80.

¹²⁵ 81.

access to power or be excluded from it, not why this particular division of power was necessary in the first place. As will be elaborated on presently,¹²⁶ explaining why the division itself should exist requires a further normative argument based on social utility.

As to vigilantism and principles of differentiation, it will be shown in chapter 5 that vigilantes, too, engage in self-legitimation. They cannot effectively appropriate an aspect of state authority (the power to punish) without sustaining a genuine belief in the rightfulness of their power, and being able to convince others of its rightfulness too. In his discussion on legitimate domination Weber notes that in order to secure obedience, all (potential) power-holders “[attempt] to establish and to cultivate a belief in [their] legitimacy”.¹²⁷ As Bottoms and Tankebe astutely observe, this implies that not only do power-holders’ assertions of legitimacy address multiple audiences, but also that all claims to legitimacy are ongoing, entailing “some kind of continuing relationship between the power-holder and the audience(s)”.¹²⁸ Vigilantes, no less than the state, aspire to develop a distinctive identity that depicts (to others) and justifies (to themselves)¹²⁹ their exercise of power in the crime-fighting sphere. As will become apparent, vigilantes “challenge the authority of the state from within and from outside, using its own language of authority, and at the same time draw on, if not directly mimic, its procedural and symbolic forms of legitimacy”.¹³⁰ The elaborate counter-legitimation rituals and ideologies they employ both to justify their *prima facie* criminal acts to themselves and others and to mobilise popular support, are scrutinised at length in chapter 5 and Appendix A. Corresponding state re-legitimation strategies are examined further in chapters 6 and 7.

¹²⁶ See § 3 5 2 2 below.

¹²⁷ Weber *Economy and Society: An Outline of Interpretive Sociology* 213.

¹²⁸ Bottoms & Tankebe (2012) *The Journal of Criminal Law and Criminology* 128-129. See also § 3 3 2 above for more on the dynamic nature of legitimacy.

¹²⁹ Barker *Legitimizing Identities* 136.

¹³⁰ Buur (2006) *Development and Change* at 750.

3 5 2 2 *Principles of common interest and social contract*

Now that the self-legitimation strategies of those in power have been considered, it is necessary to concentrate on how power-holders justify their power to those subject to it. Any expansion of power by the dominant is necessarily dependent on a corresponding limitation of the subordinate's power, and is achieved at their expense. The systematic transfer of powers (of resources and opportunities) from subordinate to dominant is inherently exploitative – even parasitic – and is clearly in need of justification.¹³¹ The type of normative legitimacy discussed here therefore aims not to show power-holders' "sense of justified superiority"¹³² and separateness from those they rule, as was the intention of the principles of differentiation outlined above, but rather expresses their solidarity with their subordinates by demonstrating shared interests. For there to be legitimacy, the concentration of moral authority in the hands of the powerful must be shown to be justifiable to the subordinate in terms of a common framework of belief. Normatively justifiable exercise of power should promote not merely the well-being of the powerful themselves, but also serve and satisfy the interests of the subordinate, including larger social purposes that advance the common good. This "due performance" criterion¹³³ – entailing the powerful successfully carrying out functions that advance the general interest – both contributes to, and forms a vital component of, the legitimacy of power-holders.¹³⁴

As regards the state-citizen power relationship specifically, what are the essential societal functions that the state exists to fulfil (and which may justify its intrusive and coercive power to its citizens)? While one of the core justifications for the existence of the state is undoubtedly its duty to create the conditions necessary to ensure the material welfare of its citizens, the fundamental state function most relevant for present purposes is its purported ability to safeguard the physical security of its inhabitants.¹³⁵

¹³¹ Beetham *Legitimation of Power* 58-60.

¹³² 82.

¹³³ xiii.

¹³⁴ 137.

¹³⁵ See 138. See also G Agamben *Means Without End: Notes on Politics* (2000) 5-6, where he argues that "power no longer has today any form of legitimization other than emergency" – i.e., it is only

Perhaps the definitive statement of the view that the sovereign state exists to guarantee the physical security of its people is contained in Thomas Hobbes's social contract theory. In *Leviathan*, Hobbes outlines in detail how state coercion comes into being. Before the existence of government, says Hobbes, all men are entirely individualistic, naturally equal, and all desire not only to preserve their own life and liberty, but also to acquire dominion over others, owing to the basic impulse to self-preservation. This natural condition of mankind he calls the "state of nature" and it inevitably entails war of all against all. Hobbes depicts this pre-government state as "... a time of Warre, where every man is Enemy to every man ... continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short."¹³⁶ Needless to say, this state of affairs is undesirable; indeed, Hobbes views almost anything else as preferable to it. Hobbes states, therefore, that in order to preserve their lives, men must seek peace. However, self-preservation and an escape from the natural state of war are only possible if all agree to waive their natural rights to personal self-protection:

"That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe."¹³⁷

Unfortunately, the existence of this contract is constantly threatened by the natural human hunger for power. Hobbes concludes that a central sovereign authority is required to force people to uphold the contract. This gives rise to the "explanatory myth" of the social contract, which entails people coming together as a commonwealth (state) and making a covenant to

protecting citizens from continuous threats to their lives that gives a sovereign the justification to exercise power. Research undertaken in South Africa about the antecedents of police legitimacy by Bradford et al ((2014) *Regulation & Governance* 259) found, interestingly, that there is also a statistically significant association between satisfaction with basic service provision (i.e., the state ensuring the material welfare of its citizens) and a perceived duty to obey the police. They speculate that this may be because "satisfaction with service provision ... may generate a belief that the state is fulfilling its side of the social contract, activating a reciprocal duty to defer to its representatives", which definitely seems plausible.

¹³⁶ T Hobbes *Leviathan* (1973) chapter 13 at 64-65.

¹³⁷ Chapter 14 at 67.

choose a sovereign (or sovereign body) to exercise authority over them, thus putting an end to universal war.¹³⁸ This sovereign (Leviathan) operates through fear, and the subjects' duty to submit is absolute; all rights of the individual¹³⁹ must be transferred to the sovereign in order for this protection to be effective. The sovereign has the right both to create and to enforce social norms.¹⁴⁰ The sovereign's right to punish anyone who breaks the covenant flows from those who have authorised it by abandoning their own right to punish: "[I]n laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all."¹⁴¹ In this way the threat of state punishment (coercion) ensures the continued operation of the social contract and enhances the prospect of peace for all.

According to Hobbes, the social contract means that only the state has the right to punish, and the aim of using such physical force is to provide security and order in society. By definition, the state monopolises "'legitimate coercion' in a civilization".¹⁴² This "normative prescription"¹⁴³ that it is the *state* that monopolises coercion is endorsed by Weber, who writes:

"A state is a human community that (successfully) claims *monopoly of the legitimate use of physical force* within a given territory. Note that 'territory' is one of the characteristics of the state. Specifically, at the present time, the right to use physical force is ascribed to other institutions only to the extent which the state permits it. The state is considered the sole source of the 'right' to use violence."¹⁴⁴

It is certainly debatable whether this description of state sovereignty rings true in an African context. Baker flatly denies that African states have ever had a monopoly of coercion, claiming they lack the capacity to secure

¹³⁸ B Russell *History of Western Philosophy and its Connection with Political and Social Circumstances from the Earliest Times to the Present Day* (1994) 535.

¹³⁹ Bar one important exception that is discussed below.

¹⁴⁰ T Campbell *Seven Theories of Human Society* (1981) 79.

¹⁴¹ Hobbes *Leviathan* chapter 28 at 165.

¹⁴² Enion (2009) *Duke Law Journal* 524.

¹⁴³ Baker *Security in Post-Conflict Africa* 12.

¹⁴⁴ M Weber *From Max Weber: Essays in Sociology* (1948) 78.

such a monopoly.¹⁴⁵ However, it must also be acknowledged that regardless of whether or not African states were ever in reality “states” in this sense, they nevertheless aspire to the ideal of statehood, with all the power and privileges that being recognised as the sole authoriser of violence entails. For this reason they desire legitimacy, and it would therefore be unwise simply to dismiss the social contract idea as an irrelevance.¹⁴⁶

The social contract between a state and its citizens would prevent the state from renouncing its responsibility to provide security and order in society,¹⁴⁷ but this, Rhead Enion argues, does not necessarily imply that the state must supply all the legitimate force itself. Rather, an essential characteristic of the state is that it has the power to *allocate* the use of such force (whether by itself or by others authorised by it),¹⁴⁸ since a quality of sovereignty is “the power to define what ‘normal’ is (and consequently isn’t) ... for when law is valid and what it applies to.”¹⁴⁹

As has been explained, the original reason posited for establishing Leviathan was for it to exercise the right to self-preservation on its subjects’ behalf. This implies that “[t]he legitimacy and the very existence of the state (and the government) depend ultimately on the effective protection by the state – the effective protector – of individual natural rights”.¹⁵⁰ The converse is also true: state claims to wield a monopoly of legitimate force will lack moral weight if the state is unable to deal effectively with threats to social stability and established order: “a persistent failure to guarantee physical security will

¹⁴⁵ Baker *Security in Post-Conflict Africa* 12-13. See also J Herbst “Responding to State Failure in Africa” (1996/97) 21 (3) *International Security* 120 122, who states categorically: “The notion that Africa was ever composed of sovereign states classically defined as having a monopoly on the force in the territory within their boundaries is false.”

¹⁴⁶ In the African context, Nugent distinguishes between three different types of social contract: a coercive social contract, where “people surrender their political voice in return for being spared from predatory acts”; a productive social contract, according to which the sovereign authority and its subjects enter into “negotiation over how the rule by the former can contribute to the well-being of the latter”; and a permissive social contract, whereby the sovereign chooses not to exercise (some of) its sovereign rights in exchange for securing a degree of *de facto* compliance (P Nugent “States and Social Contracts in Africa” (2010) 63 *New Left Review* 35 43-44).

¹⁴⁷ Enion (2009) *Duke Law Journal* 541.

¹⁴⁸ 525-526.

¹⁴⁹ L Buur “The Horror of the Mob: The Violence of Imagination in South Africa” (2009) 29 (1) *Critique of Anthropology* 27 46.

¹⁵⁰ Malan (2007) *Tydskrif vir die Suid-Afrikaanse Reg* 649.

undermine confidence in the system of government, since it will be seen to be failing in its most essential purpose”.¹⁵¹

This aspect of legitimacy seems to provide the most convincing rationale for the vigilante belief that their conduct is justified – and the judiciary appears to accept such reasoning too. In *S v Makwanyane* Ackermann J explicitly recognises the danger of vigilantism ensuing if the state does not uphold its side of the social contract.¹⁵²

“[I]n a constitutional state individuals agree (in principle at least) to abandon their right to self-help in the protection of their rights only because the State, in the constitutional state compact, assumes the obligation to protect these rights. If the State fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights. This is not a fanciful possibility in South Africa.”

Hobbes’s view is that the natural right to self-protection is the only right that is inalienable¹⁵³ and its exercise by individuals is merely suspended on condition that Leviathan effectively discharges its protective responsibilities and duties:

“The Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them. For the right men have by Nature to protect themselves when none else can protect them, can by no Covenant be relinquished.”¹⁵⁴

¹⁵¹ Beetham *Legitimation of Power* 138. Having this exclusive power to enact legal rules that adjudicate on the legitimacy of any coercive force used in its society entails that the sovereign state may delegate the provision of law and order to others, including private citizens. The important question of how the state distinguishes between legitimate and illegitimate force, and more specifically, on what grounds the state refuses to accord legitimacy to the self-help practised by vigilantes, but does permit citizens to take the law into their own hands in other instances, such as in private defence, is considered above at § 2 5 1.

¹⁵² *S v Makwanyane* para 168.

¹⁵³ P Riley *Will and Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant, and Hegel* (1982) 30-31.

¹⁵⁴ Hobbes *Leviathan* chapter 21 at 116.

In terms of the Hobbesian theory, what vigilantes are doing is merely reclaiming their right to self-help. Malan argues that the natural conclusion of Hobbes's argument is that where the state is incapable of effectively discharging its responsibilities by protecting inherent rights to life, bodily integrity and property, "the individual's dormant right to self-help revives" and is operational for as long as the state is incapable of restoring and keeping the peace, and securing freedom from violence.¹⁵⁵ It is trite law that the inherent right¹⁵⁶ to private defence – to "temporarily act on behalf of the state authority in order to uphold the law"¹⁵⁷ – automatically accrues to anyone who is in a situation where the state cannot protect them from an imminent unlawful attack,¹⁵⁸ but vigilantes take it one step further. Rightly or wrongly, vigilantes regard the state as not having fulfilled its side of what Wood,¹⁵⁹ quoting Elias, terms the "civilizing bargain" due to inadequate law and order maintenance, and they respond by challenging the social contract and co-opting the responsibilities and authority of the formal criminal justice system to punish deviants themselves.¹⁶⁰

In *S v Schrich*, which concerned an accused who committed various serious offences while on a mission as part of a PAGAD "G-Force" to rid Kraaifontein of drug-dealers and gangsters, Hoffman AJ makes some telling comments about the connection between vigilantism, legitimacy and the criminal justice system:

"Only an obscure and infinitesimal minority on the extreme fringes of society questions the legitimacy of the current constitutional order in the new South Africa. If our constitutional State compact enjoys a high degree of acceptance in the population, an explanation for the recent vigilante action cannot be attributed (as it was in the old South Africa) to the illegitimacy of the government

¹⁵⁵ Malan (2007) *Tydskrif vir die Suid-Afrikaanse Reg* 650.

¹⁵⁶ Burchell *Principles* 117.

¹⁵⁷ Snyman *Criminal Law* 103.

¹⁵⁸ See § 2 5 1 above.

¹⁵⁹ J C Wood "Self-Policing and the Policing of the Self: Violence, Protection and the Civilizing Bargain in Britain" (2003) 7 (1) *Crime, History and Societies* 2 13.

¹⁶⁰ Yanay (1993) *Journal of Public Policy* 383; A Silke "Dealing with Vigilantism: Issues and Lessons for the Police" (2001) 74 *The Police Journal* 120 126.

of the day. The current wave of vigilantism would appear to be more focused on the perceived failure of the State properly to discharge its duty through the efficient administration of the criminal justice system to ensure that criminals are apprehended and convicted as necessary conditions precedent to their punishment.”¹⁶¹

This quote is significant in that it contains references to both of the legitimacy dimensions already discussed. The term legitimacy itself is evidently used in the sense of legal legitimacy, and confirms the conclusion reached in § 3 4 1 above that engaging in vigilantism does not imply that vigilantes totally reject as illegitimate the government and the constitutional rules upon which its power is based. This is juxtaposed with the last sentence, which homes in on the normative legitimacy deficit that, it is submitted, is at the heart of vigilantes’ grievances against the state: the perceived failure of the criminal justice system to promote the common good by performing its duties in such a way as to “justify its enormous concentration of power”.¹⁶² As is argued further in chapter 4 below, vigilantes’ radical form of reactivating “the right to fend off violence personally”¹⁶³ is precipitated to a large extent by their lack of confidence in the state’s ability to serve its fundamental social function of preserving the established order against internal or external threat,¹⁶⁴ either in a manner that respects the values of procedural justice, or at all.

3 6 Demonstrative legitimacy

Now that the rule conformity and normative validity components of legitimacy have been considered, Beetham’s third dimension, namely “performative acts” that afford public acknowledgement of the authority of power holders,¹⁶⁵ reinforcing their right to rule, merits further exploration.

¹⁶¹ *S v Schrich* 367B-C.

¹⁶² Beetham *Legitimation of Power* 137.

¹⁶³ Malan (2007) *Tydskrif vir die Suid-Afrikaanse Reg* 653.

¹⁶⁴ Shearing (1992) *Crime and Justice* 400.

¹⁶⁵ Beetham *Legitimation of Power* xiv.

Beetham argues that public actions demonstrating recognition of a power relationship serve not merely as expressions of the subordinates' belief in the legitimacy of the power-holder, but that they actually confer – and contribute to enhancing – the dominant's legitimacy.¹⁶⁶ Beetham distinguishes between two modes of demonstrative legitimacy: acts that are contractual in nature, such as participating in elections or swearing an oath of allegiance; and those that are expressive, for instance mass mobilisation or public acclamation. He is of the view that the former mode is forward-looking, since it “carries obligatory force and legitimating effect” through the “normative force of promising” that is binding into the future, regardless of the motive of the promise-maker.¹⁶⁷ The latter mode, which focuses on demonstrative acts in support of a power-holder, is not obligatory in this sense since it “involves no undertaking in respect of the future”.¹⁶⁸ Expressive modes of legitimation must therefore be continually demonstrated, and the motive with which they are performed will determine their normative impact.

Public demonstrations of legitimation contribute to power-holders' legitimacy by reinforcing subordinates' normative obligation, creating a moral duty on the part of those who engage in them to defer to the dominant. They also have a symbolic or declaratory force for the power-holder, since public acclamation by subordinates expresses and confirms the legitimacy of the powerful to a wider audience. Whereas the process of self-legitimation referred to in § 3 5 2 1 above signifies the desire of those in power to justify the normative “rightness” of their authority both to themselves and to their subordinates, legitimation of the powerful by those subject to such power symbolically communicates their willingness to submit to the moral authority of the powerful.

What is the opposite of such legitimation, and what may precipitate an active withdrawal of consent, a delegitimation of power? Beetham argues that where a system of power is unable to enforce respect for its rules, or becomes chronically unable to justify its existence in terms of shared beliefs

¹⁶⁶ 12.

¹⁶⁷ 95.

¹⁶⁸ 95.

by satisfying the interests of the subordinate, the negative aspects of power relations, which may have been obscured or redefined through the legitimisation process, “are starkly exposed, and experienced for what they are”.¹⁶⁹ The disillusionment triggered by a legitimacy deficit tends to exacerbate subordinates’ frustration and resentment, and make them less normatively inclined to co-operate willingly with, and actively support, those in power. This “negative awareness” may simply cause subordinates to display passive resentment, the eroded goodwill between themselves and power-holders leading them to resigning themselves to fulfilling their obligations as subordinates reluctantly and grudgingly, with little or no moral incentive.¹⁷⁰ This is certainly undesirable from the perspective of the power-holder; however, it is not as extreme as the crisis that is precipitated should subordinates choose to withdraw their consent, actively engaging in the delegitimation of those in power and undermining their moral standing and capacity to rule to a far greater extent. According to Beetham, whether opposition to government has the potential for delegitimation depends on whether its aim is to “make the policies of government unworkable, or actively bring it down, or to demonstrate allegiance to a different political order”¹⁷¹ – i.e., whether the delegitimation challenge is aimed at the claims of the powerful that they exercise their authority with the subordinates’ consent.¹⁷² The ultimate demonstration of delegitimation entails subordinates collectively laying claim to the moral authority of the powerful by presenting themselves as an alternative source of legitimate power.¹⁷³

While it is obvious that an all-out rebellion culminating in a revolution or *coup d’état* is a powerful expression of delegitimation, does vigilantes’ temporary and less extreme usurpation of state power to fill the policing vacuum left by the state’s seeming inability to preserve a satisfactory level of

¹⁶⁹ 109.

¹⁷⁰ 109.

¹⁷¹ 209.

¹⁷² It must be noted that where a political order is insecure, authorities may perceive even relatively minor challenges to state power as potential demonstrations of delegitimation.

¹⁷³ Beetham *Legitimation of Power* 109 adds that before existing relations of power have the potential to be transformed by counter-legitimation, there must be the possibility for subordinates to communicate with others in a space relatively protected from the influence of the powerful, and they should possess the “imagination to conceive of a different set of rules and relations for the fulfilment of basic social needs from the existing ones”.

social order and collective security also amount to an act of state delegitimation? To test this, it is helpful to attempt to apply the theoretical insights already gained about legitimacy to a hypothetical vigilante scenario to establish whether the steps in the delegitimation process are indeed present.

Delegitimation is preceded by a legitimacy deficit. The potential legitimacy erosion applicable in the vigilante context would be that caused by the state's incapacity to secure the general interest owing to its failure to fulfil its essential task of protecting its citizens by means of an effective and procedurally fair criminal justice system. This could well cause citizens to have less moral incentive to support the law as an institution, resulting in their not feeling a particularly strong normative obligation to uphold the law. The next stage would be for these citizens to make the transition from feeling perpetually dissatisfied with and mistrustful of state law-enforcement, but powerless to imagine alternatives to deal with crime and disorder, to them withdrawing their consent to be subjected to formal law-enforcement. This could come in the passive form of citizens simply not reporting crime to the police, for instance, but active delegitimation – citizens feeling empowered to transform themselves into an alternative source of authority in the criminal justice domain – entails something more. Potential vigilantes (who would probably be ordinary members of communities with high levels of crime and social disorder, where the state had shown itself to be unwilling or unable to enforce their criminal justice-related interests on their behalf) would need to create a space to come together and envisage an alternate (informal) system of law with new rules of power, with personnel, prohibitions and sanctions that were comparable to those of the existing formal criminal justice system, but based on, and upholding, a different set of values.¹⁷⁴ Lastly, these alternative (vigilante) “law-enforcement” agents would need to demonstrate their counter-legitimate criminal justice power by performing the policing and legal adjudication functions of “arresting”, “trying” and “punishing” perceived wrongdoers. These functions would have to be performed in such a way as to command a significant degree of popular support, denoting that expressive

¹⁷⁴ See chapter 5 for more on ways in which vigilantes engage in such counter-legitimation strategies.

legitimation had been demonstrated both for the actions themselves as well as for their underlying criminal justice values and rules.

Based on what has been said about demonstrative legitimacy above, it seems clear that acts of vigilantism may indeed be characterised as a manifestation of significant state delegitimation, albeit confined to the criminal justice sphere.

3 7 Using legitimacy attribution to better understand legitimacy itself

The assumed correlation between eroded legitimacy and increased vigilantism has thus far been explored briefly in the specific context of demonstrative legitimacy and state delegitimation. However, even if one accepts that state legitimacy is weakened by the (perceived or actual) inadequacies of the criminal justice system,¹⁷⁵ before the factors contributing to state delegitimation can be investigated further, the premise that a legitimacy deficit leads to vigilantism needs to be somewhat enlarged upon. To this end, the assumed link between poor state performance, state legitimacy and citizens' normative willingness to comply must be clarified and substantiated. It is necessary to return to the research conducted by Tom Tyler and his associates that was briefly referred to in § 3 2 2 above. This research focuses upon the grounds on which citizens choose to ascribe legitimacy to the state¹⁷⁶ rather than specifically using Beetham's paradigm of whether the state is truly legitimate in terms of the legal, normative and demonstrative dimensions explored above, but it may nevertheless provide useful insight into the mechanisms underlying legitimacy attribution. The findings and implications of the research on the relevance of legitimacy in the criminal justice sphere will be outlined briefly, and case law indicating legal support for these conclusions is also cited where applicable. Intriguingly, in more recent decisions South African judges tend to resort to decidedly Tylerian language to express sentiments about legitimacy.

¹⁷⁵ As was theorised above at § 3 5 2 2 and is elaborated on at § 4 2 5 below.

¹⁷⁶ E.g. Paternoster, et al. (1997) *Law and Society Review* 167.

A series of empirical studies by Tyler and others¹⁷⁷ isolated various antecedents of legitimacy (concisely defined as “the belief that legal authorities are entitled to be obeyed”).¹⁷⁸ It was found that whether citizens feel themselves obliged to defer to authorities is strongly influenced by various factors, the most significant of which is procedural justice. As recognised by the Constitutional Court *per* O’ Regan J,¹⁷⁹ “[f]air process improves the quality of decisions and establishes their legitimacy.”

Procedural justice in turn is conceptualised as having two components, namely the quality of legal decision-making and fair interpersonal treatment. As regards the first component, namely the quality of legal decision-making itself, considerations such as whether authorities act in a manner that is neutral, independent, objective and unbiased, whether decisions are consistent, competent and rule-based, and whether authorities are open and transparent and give reasons for their decisions, have been found to be crucial in determining the perceived fairness of decision-making. Our courts readily acknowledge the importance of fair decision-making for the legitimacy of the judiciary. As regards the crucial role played by judicial impartiality, in *South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* Cameron J holds as follows:

“In South Africa ... the administration of justice, emerging as it has from ‘the evils and immorality of the old order’ remains vulnerable to attacks on its legitimacy and integrity. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of Judges and magistrates that ill-founded and

¹⁷⁷ Including Tyler *Why People Obey the Law*; Paternoster, et al. (1997) *Law and Society Review*; Tyler & Huo *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*; Sunshine & Tyler (2003) *Law & Society Review*; Tyler (2003) *Crime and Justice*; Tyler (2006) *Journal of Social Issues*; T R Tyler *Legitimacy and Criminal Justice: International Perspectives* (2007); Tyler & Jackson (2014) *Psychology, Public Policy, and Law*.

¹⁷⁸ Tyler (2003) *Crime and Justice* 306.

¹⁷⁹ In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others (Centre on Housing Rights and Evictions and another, amici curiae)* 2010 3 SA 454 (CC) para 296.

misdirected challenges to the composition of a Bench be discouraged. On the other, the courts' very vulnerability serves to underscore *the pre-eminent value to be placed on public confidence in impartial adjudication*".¹⁸⁰

In respect of the importance of judicial independence, in *City of Cape Town v Premier, Western Cape, and others* the court quotes the Canadian case of *Ell v Alberta*,¹⁸¹ where it was held:

"A separate, but related, basis for independence is the need to uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. *Without the perception of independence, the judiciary is unable to 'claim any legitimacy or command the respect and acceptance that are essential to it'.*"¹⁸²

Openness – justice not only being done, but being seen to be done – is a cornerstone of the law. In *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as amicus curiae) S v O'Connell and others*, Yacoob J states:

"*Seeing justice done in court enhances public confidence in the criminal-justice process and assists victims, the accused and the broader community to accept the legitimacy of that process.* Open courtrooms foster Judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed doors, faith in the criminal-justice system may be lost. No democratic society can risk losing that faith."¹⁸³

¹⁸⁰ *South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 17 (emphasis added).

¹⁸¹ *Ell v Alberta* 2003 SCC 35 ([2003] 1 SCR 857) (emphasis added).

¹⁸² *City of Cape Town v Premier, Western Cape, and others* 2008 6 SA 345 (C) para 174.

¹⁸³ *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as amicus curiae); S v O'Connell and others* 2007 2 SACR 28 (CC) para 26 (emphasis added).

Tellingly, Sachs J opines¹⁸⁴ that “[i]n our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness”. Transparency and openness are linked to having access to the reasons for decision-making by legal authorities. This is confirmed in *FM v Minister of Home Affairs*:

“[T]he duty to give reasons serves a dual purpose: on the one hand, it provides benefits and protections for a person who is adversely affected by a decision; and on the other hand, it is a fundamental requirement of good governance in and of itself in that it advances the goal of transparency, and enhances public confidence in, and the legitimacy of, the administrative process.”¹⁸⁵

It is not only the quality of the decision-making that plays a role in citizens’ judgments about procedural justice, and hence assessments of legitimacy, however. The second component of procedural justice, namely fair interpersonal treatment, is crucial for perceptions of procedural fairness and legitimacy.¹⁸⁶ Citizens value being treated with dignity and respect, as well as having their rights acknowledged and being given an opportunity to participate in procedures that concern them. Human dignity’s centrality to state legitimacy is highlighted in the minority judgment of *The Citizen 1978 (Pty) Ltd and others v McBride (Johnstone and others, amici curiae)*:

“[T]he Constitution holds human dignity up as not only a human right that is given constitutional recognition, as with freedom of expression, but also as a *fundamental value upon which the legitimacy of the sovereign State is based*. The Republic was ‘founded on’ the value of human dignity, and failure to uphold that

¹⁸⁴ *Matatiele Municipality and others v President of the Republic of South Africa and others* 2006 5 SA 47 (CC) para 110. For more on the link between openness and legitimacy, see *King and others v Attorney's Fidelity Fund Board of Control and another* 2006 1 SA 474 (SCA) para 20-21; *Inkatha Freedom Party v Electoral Commission* 2006 3 SA 396 (EC) para 8; *Coetzee v Government of the Republic of South Africa; Matiso and others v Commanding Officer, Port Elizabeth Prison, and others* 1995 4 SA 631 (CC) para 46.

¹⁸⁵ *FM v Minister of Home Affairs* 2014 JDR 1732 (GP) para 121.

¹⁸⁶ Tyler & Jackson (2014) *Psychology, Public Policy, and Law* 89.

value is both a violation of a constitutional right and a threat to a bedrock principle that underpins the legitimacy of the State.”¹⁸⁷

The need to recognise human rights is frequently mentioned in the criminal justice context with reference to due process and fair trial rights. In *S v Molimi*,¹⁸⁸ for instance, Nkabinde J held that “proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy.” Similarly, Tshabalala JP stated as follows in *S v Khumalo and others*:¹⁸⁹ “[T]he right to a fair trial is integral to a democratic country intent on developing a culture of respect and legitimacy for the criminal justice system.” The Constitutional Court (*per* Mokgoro J) also pertinently linked the denial of the right to access to court to an increased likelihood of vigilantism:

“The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. *The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes.* Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance.”¹⁹⁰

As regards the opportunity to participate in decision-making, Skweyiya J (quoting Hoexter) declares as follows:

“Procedural fairness ... is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also

¹⁸⁷ *The Citizen 1978 (Pty) Ltd and others v McBride (Johnstone and others, amici curiae)* 2011 4 SA 191 (CC) para 143 (emphasis added).

¹⁸⁸ *S v Molimi* 2008 2 SACR 76 (CC) para 42.

¹⁸⁹ *S v Khumalo and others* 2006 1 SACR 447 (N) 459C.

¹⁹⁰ *Lesapo v North West Agricultural Bank* para 22 (emphasis added).

likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.”¹⁹¹

The need for citizen participation in the legislative process was pertinently addressed in *Doctors for Life International v Speaker of the National Assembly and others*, where Ncgobo J states:

“The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.”¹⁹²

Responsiveness to the needs of citizens, including their changing values and the *boni mores*, is related to the fair treatment idea that legal authorities need to be in touch with citizen priorities. In *Herholdt v Wills* this is acknowledged, and this judgment makes explicit the Tylerian link between legitimacy and obedience to the law:

“The law has to take into account changing realities, not only technologically, but also socially, or else it will lose credibility in the eyes of the people. Without credibility, law loses legitimacy. If law loses legitimacy, it loses acceptance. If it loses acceptance, it loses obedience.”¹⁹³

Lastly, citizens are more likely align themselves normatively with legal authorities if they trust in their motives or character.¹⁹⁴ Such “motive-based

¹⁹¹ *Joseph and others v City of Johannesburg and others* 2010 4 SA 55 (CC) para 42.

¹⁹² *Doctors for Life International v Speaker of the National Assembly and others* 2006 6 SA 416 (CC) para 205.

¹⁹³ *Heroldt v Wills* 2013 2 SA 530 (GJ) para 31.

¹⁹⁴ *Tyler & Huo Trust in the Law: Encouraging Public Cooperation with the Police and Courts* 58.

trust” is present when citizens believe legal authorities to be benevolent, acting *bona fide* and sincerely trying to do what is best.¹⁹⁵

The above discussion showing the importance of procedural justice for legitimacy does not mean that considerations of distributive justice and effectiveness are irrelevant in determining citizens’ belief that legal authorities are entitled to be obeyed: on the contrary. While studies in societies that are relatively wealthy and have stable and well-established police services have consistently found that motives related to effective performance are less significantly correlated to perceptions of legitimacy than the procedural justice components referred to above,¹⁹⁶ these findings are not supported by an empirical study of the legitimacy of the police in South Africa conducted by Bradford et al. Their research assessed legitimacy as both a duty to obey and a sense of moral alignment with the police. Focusing on the moral alignment dimension of legitimacy, as opposed to merely considering legal compliance, the study purposely taps into Beetham’s insight regarding the importance of those in power and their subordinates sharing a set of general values and principles.¹⁹⁷ Legitimacy in this wider sense points to shared goals, purposes and values between dominant and subordinate, and studies have linked it to identification with a group and a broader willingness to work together actively and willingly to address collective issues.¹⁹⁸ Bradford et al found that although there was a statistically significant association between trust in the fairness of police and a sense of moral alignment with them, procedural fairness was not associated with a sense of duty to obey.¹⁹⁹ Similarly, generalised trust in government was linked to a sense of moral alignment with the police, but not with a perceived duty to obey officers.²⁰⁰ While procedural justice did explain some variation in legitimacy perceptions, and, significantly, “personal experiences of police and perceptions of corruption were associated

¹⁹⁵ Tyler & Jackson (2014) *Psychology, Public Policy, and Law* 82. The link between a lack of citizen trust and vigilantism is explored in chapter 4.

¹⁹⁶ Tyler *Why People Obey the Law*; Tyler (2003) *Crime and Justice*; Tyler & Huo *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*; Sunshine & Tyler (2003) *Law & Society Review*.

¹⁹⁷ Bradford, et al. (2014) *Regulation & Governance* 254.

¹⁹⁸ Tyler & Jackson (2014) *Psychology, Public Policy, and Law* 80.

¹⁹⁹ Bradford, et al. (2014) *Regulation & Governance* particularly at 258.

²⁰⁰ 259.

with trust in procedural justice and legitimacy”,²⁰¹ Bradford et al found that trust in police effectiveness was a stronger predictor of both legitimacy components. Bradford et al conclude that, to a greater extent than in first-world settings, “the legitimacy of the police is seriously undermined by perceptions that it is ineffective in the ‘fight against crime’”.²⁰² They hypothesise that this is due to the fact that in South Africa, the basic social utility of the police is not regarded as a given; nor is there “a baseline assumption of police efficacy” that may open up a greater space for legitimacy judgments based on procedural justice considerations.²⁰³ A significant question-mark hangs over the ability of the police to provide security, which is evidenced by the widespread resort to informal justice solutions. This may be why South Africans place more emphasis on crime concerns and effectiveness when forming legitimacy judgments. South African courts have also acknowledged the link between legitimacy erosion and a poorly-functioning criminal justice system. Olivier JA in *Govender v Minister of Safety and Security* stated:

“The State has the duty to preserve the criminal justice system’s effectiveness as a deterrent to crime ... A failure by the State to preserve the effectiveness of the criminal justice system will end in lawlessness and a loss of the legitimacy of the State itself.”²⁰⁴

Various practical implications for the state of the research by Tyler and his associates and Bradford et al are considered further in § 6 2 3. Suffice it to sum up at this point that empirical findings about legitimacy show that if legal authorities act in ways that are biased, inconsistent, incompetent, ineffective or non-transparent, or treat citizens in a manner that is disrespectful of their human dignity or of their right to participate in decision-making, this may have dire consequences for criminal justice power-holders. To explain in terms of the Beetham legitimacy paradigm, where effective law-

²⁰¹ 260.

²⁰² 261.

²⁰³ 260.

²⁰⁴ *Govender v Minister of Safety and Security* 2001 4 SA 273 (SCA) para 12. This was cited with approval in *Ex Parte Minister of Safety and Security and others; In re S v Walters* 2002 2 SACR 105 (CC) para 36.

enforcement or procedural justice is lacking, citizen confidence in the overall abilities of the criminal justice system may erode, making citizens less likely to ascribe normative legitimacy to legal authorities, which in turn has repercussions for demonstrative legitimacy. The research of Tyler and his associates confirms that where citizens do not view legal authorities as legitimate they are less inclined to obey them, to co-operate with them, to empower them to take decisions on their behalf and to engage with them to address collective issues.²⁰⁵

Viewed from this perspective, vigilantism appears to be an extreme symptom of unfavourable perceptions of state performance in the broad sense. Such perceptions cause citizens' willingness to legitimate the state to erode, and may result in their having little or no compunction about actively defying the state by taking the law into their own hands. Linking this more clearly to the Beetham-style legitimacy dimensions: where due performance is lacking in that criminal justice agents do not realise the purposes expected of them as a condition for their position of power, or conform to socially accepted standards in exercising such power,²⁰⁶ a normative legitimacy deficit results which alienates citizens from the state. This makes them reluctant to trust the legal authorities or to attribute legitimacy to them, and in extreme cases results in citizens actively demonstrating non-compliance, including resorting to self-help, thus effectively delegitimizing the formal criminal justice process.

3 8 Conclusion

The arguments advanced and conclusions reached in this chapter appear to support the assumption that state efficiency and procedural justice, legitimacy and a propensity to vigilantism are closely intertwined in a "vicious circle"-type link.²⁰⁷ While vigilantism does not challenge legal legitimacy *per se*, apparent or actual state inability to offer credible guarantees of order and security, and/or the state's inability to be responsive to social priorities in this

²⁰⁵ Tyler (2003) *Crime and Justice*; Tyler & Jackson (2014) *Psychology, Public Policy, and Law*.

²⁰⁶ Beetham *Legitimation of Power* 259.

²⁰⁷ These conclusions are in line with the assumed link proposed in the flow chart in § 3 1 above.

regard, are both a cause and a consequence of a legitimacy deficit: inadequate state collective security guarantees weaken normative legitimacy by diminishing citizens' trust in the criminal justice system, hence eroding feelings of moral obligation to obey, and increasing the likelihood of citizens taking the law into their own hands. In this paradigm, an upsurge in vigilantism may be understood as an expression of state delegitimation, undermining demonstrative legitimacy, which in turn fosters further perceptions of ineffectiveness and more disorder and instability. Vigilante violence patently signals citizen reluctance to acquiesce to the state claim of the exclusive monopoly on the allocation of force and sends legal authorities a powerful message of criticism: Do your job properly or risk having your authority undermined still further.

As will become apparent in the rest of this thesis, there is no doubt that this underlying dynamic of (state) legitimacy erosion and delegitimation followed by (vigilante) counter-legitimation is a very useful explanatory framework for understanding the processes involved in the conduct of vigilantes. The various conclusions underlying the legitimacy-vigilantism paradigm arrived at in this chapter are revisited later in the study. The approach followed in chapter 4 is based on the assumption that the state bears considerable responsibility in fostering vigilante-proneness. In discussing the role of legitimacy erosion and legitimacy "gaps" in promoting vigilantism, it highlights particular instances where the state has failed to achieve normative legitimacy. In chapter 5, vigilantism is conceptualised as a counter-legitimate force that is a manifestation of state delegitimation. Vigilante practices and rituals are understood as being a way for vigilantes to boost their power by addressing the "law-enforcement" concerns of the communities they serve and in so doing, to attain a form of legal, normative and demonstrative legitimacy. Chapters 6 and 7 conceive of the state as being able – at least in some respects – to remedy its legitimacy deficit and neutralise vigilantes' legitimation efforts by relegitimising itself. This relegitimation exercise would require that the state convincingly demonstrate

its capacity to justify its power in terms of a common framework of belief.²⁰⁸ If the state were able to do so, it would increase the likelihood that citizens would be willing to legitimate its crime-fighting authority rather than undermining it through acts of self-help. Specific approaches that the state might consider to enlist the active co-operation and assistance of citizens in its efforts to achieve a measure of legitimacy in the criminal justice arena will be canvassed. First, however, it is necessary to concentrate on why and how the state's legitimacy deriving from its (in)ability to maintain order and security has been undermined from a citizen perspective. That is the focus of the following chapter.

²⁰⁸ Normative legitimacy, as discussed in § 3.5 above.

4 CHAPTER FOUR: STATE DELEGITIMATION

“The kitchen has to be clean. If the owner leaves it dirty, it gets cockroaches. Are the cockroaches at fault? No, the owner is at fault. The government does not clean up its own [communities] and so cockroaches pop up. The government is at fault.”

- Head of vigilante group *Mapogo A Mathamaga*, Monthle John Magolego, talking about the ascendancy of crime in Von Schnitzler et al *Guardian or Gangster?* 20. He could just as well have been explaining the origins of vigilantism!

4 1 Linking state normative legitimacy deficit and vigilantism

As was clarified in chapter 3, the exercise of state power must be both legally valid and morally justifiable for it to be truly legitimate. It was argued that a normative legitimacy deficit, and thus also a heightened propensity for vigilantism, is closely related to a state’s inability to justify its power in terms of a common framework of belief.¹ Two main grounds were posited for how the failure of the state to achieve widespread normative legitimacy could give rise to vigilantism, namely, state failure to perform the essential state function of safeguarding the physical security of its inhabitants effectively and fairly;² and the legitimacy gap caused by the values underpinning the legal rules of the formal criminal justice system being seemingly incongruent with the popular beliefs (that ought to be) sustaining them.³ In order to understand properly the role that deficient state legitimacy plays in fostering vigilantism⁴ – and concomitantly, how the state might remedy such shortcomings⁵ – the chapter

¹ See discussion of this aspect of normative legitimacy in the context of Beetham’s writings at § 3 5 2 2. In addition, E Durkheim *The Division of Labour in Society* (1984) 42 observes that “wherever an authority with power to govern is established its first and foremost function is to ensure respect for beliefs, traditions and collective practices – namely to defend the common [collective] consciousness from all its enemies, from within as well as without”.

² Identified in § 3 5 2 2.

³ See § 3 5 1 for more.

⁴ The focus of the present chapter.

⁵ The subject of chapters 6 and 7.

is divided into two sections: The first focuses on the effect of inadequate state performance on legitimacy (and consequent proneness to vigilantism), and the second highlights how the differing “crime-fighting” and “law-enforcement” values of the state and of vigilantes may play a role in precipitating vigilantism.

The first part of the chapter explores deficiencies in the state response to community security concerns. The aim is to test the validity of the contention that the breakdown in the criminal justice system’s ability to guarantee collective security and social order is one of the root causes of vigilantism. As will become evident, to characterise vigilantism as a response to inadequate formal crime-fighting initiatives is only to tell part of the story; vigilantism is more prevalent in “communities in crisis – and that crisis is about more than crime”.⁶ Endemic poverty, inequality and discrimination are also important recurring narratives in violence-plagued and vigilante-prone settings. Where the state is failing to provide acceptable levels of either security or economic opportunity – a dual failure that “reveals the limits of government power”⁷ – this reinforces the belief that the community must be prepared to help itself. It may well be, as is argued by Nolte, that vigilantism signifies a real critique of state withdrawal – a demand for “greater, not less, state presence and responsibility”⁸ not merely in the sphere of crime-fighting and security, but also aimed at improving the quality of life of all its citizens. Considering its resource constraints, the state may be able to do little to remedy some of the practical obstacles identified below as contributing to a state legitimacy deficit; there may indeed be solutions to others that do not require huge financial investment to implement and that may be promising options for the state to explore in its quest to relegitimate itself.⁹

Once the relationship between the state’s (unsuccessful) attempts to serve the common good and vigilantism has been expounded, the second

⁶ A Snodgrass Godoy “When ‘Justice’ is Criminal: Lynchings in Contemporary Latin America” (2004) 33 (6) *Theory and Society* 621 630.

⁷ Martin (2010) *Acta Criminologica* 59.

⁸ I Nolte “Ethnic Vigilantes and the State: The Oodua People’s Congress in South-Western Nigeria” (2007) 21 (1) *International Relations* 217 230-231.

⁹ See, e.g., § 6 2 below.

part of the chapter considers the need for power rules to be derived from an authoritative source, and the application and implications of this aspect of normative legitimacy¹⁰ in the context of vigilantism. This second section argues that vigilantism is an almost inevitable symptom of incongruent state and citizen “law-enforcement” beliefs relating both to the prohibitions to be enforced, and by whom and how best such enforcement should be undertaken. It will be made apparent that the tensions between formal and informal modes of justice and “crime-fighting” pose a huge challenge to state attempts to achieve full legitimacy in the criminal justice sphere, since many vigilante beliefs relating to “criminalisation” and “penalties” are anathema to the values of a constitutional state, which are based on human rights.

4 2 Obstacles to serving the common good: structural violence and (lack of) due process

In this section, some of the characteristics and conditions predisposing particular communities to vigilantism are highlighted. They relate both to objective social conditions and to the manner in which state agents respond to them.

When it comes to exploring conditions that lead to the erosion of state legitimacy in general, and particularly in the crime-fighting domain, structural violence is a useful concept for “render[ing] visible the social machinery of oppression”.¹¹ If violence is conceptualised as operating along a continuum from direct physical assault to symbolic violence and “routinised” everyday violence,¹² a significant component of the latter is “chronic, historically embedded structural violence”.¹³ Instead of understanding violence solely in

¹⁰ See § 3 5 1 for more.

¹¹ L Green, commenting on P Farmer “An Anthropology of Structural Violence” (2004) 45 (3) *Current Anthropology* 305 319.

¹² N Scheper-Hughes & P Bourgois *Violence in War and Peace* (2004) 1.

¹³ Bourgois and Scheper-Hughes comment in Farmer (2004) *Current Anthropology* 318. Structural violence is defined by P Farmer *Pathologies of Power: Health, Human Rights and the New War on the Poor* (2005) as “one way of describing social arrangements that put individuals and populations in harm’s way... The arrangements are structural because they are embedded in the political and economic organization of our social world; they are violent because they cause injury to people ... neither culture nor pure individual will is at fault; rather, historically given (and often economically

terms of its capacity to inflict physical pain, it is crucial to recognise that the violence of “poverty, hunger, social exclusion and humiliation”¹⁴ is as significant as – and indeed, more prevalent in society than – harm to bodily integrity. Farmer uses the term structural violence as a broad rubric for a host of historically-embedded destructive forces that violate human dignity, which include absolute and relative poverty and social inequalities based on race or ethnicity, gender, religion and social class, particularly those that result in a deficit of social and economic power.¹⁵ According to Farmer, such infringements of human rights are not accidents, or random in distribution or effect, but are actually “symptoms of deeper pathologies of power and are linked intimately to the social conditions that so often determine who will suffer abuse and who will be shielded from harm.”¹⁶ Crucially, whereas viewing human rights from a purely legal perspective tends to obscure the dynamics underlying human rights violations, keeping the idea of structural violence in mind allows a move away from “a moral economy ... geared to pinning praise or blame on individual actors” towards the conception that “violence [is] exerted systematically – that is, indirectly – by everyone who belongs to a certain social order”.¹⁷ Inevitably, the historically disadvantaged bear the brunt of the “unfreedoms”¹⁸ engendered by oppression and structural violence. And while state machinery may not be the only source of such structural violence, it is a hugely significant one.

As regards the link between vigilantism and structural violence, intriguingly, Farmer also classifies as structural violence those “more spectacular forms of violence that are uncontestably human rights abuses, some of them punishment for efforts to escape structural violence”.¹⁹ In line with this analysis, it is submitted that vigilantism may be characterised as one

driven) processes and forces conspire to constrain individual agency. Structural violence is visited upon all those whose social status denies them access to the fruits of scientific and social progress”. See also P Farmer, B Nizeye, S Stulac & S Keshavjee “Structural Violence and Clinical Medicine” (2006) 3 (10) *PLoS Medicine* 1686 for a definition of structural violence.

¹⁴ Scheper-Hughes & Bourgois *Violence in War and Peace* 1.

¹⁵ P Farmer “Pathologies of Power: Rethinking Health and Human Rights” (1999) 89 (10) *American Journal of Public Health* 1486 1488; Farmer *Pathologies of Power* 8; 16-17.

¹⁶ Farmer *Pathologies of Power* 7.

¹⁷ Farmer (2004) *Current Anthropology* 307.

¹⁸ Farmer *Pathologies of Power* 8.

¹⁹ 8.

such effort to escape from structural violence, with the state often responding to vigilantism – and crime in general – in ways that “spectacularly” violate human dignity. During the course of this chapter it will become clear that vigilantism is indeed more prevalent among those subject to structural violence and oppression. Poverty, marginalisation, unfair and unequal treatment and the lack of means and/or the opportunity to access formal justice almost inexorably translate into private violence,²⁰ including violent self-help.

When identifying particular forms of state (in)action in the criminal justice sphere that may perpetuate structural violence, thus leading to state delegitimation and increasing the likelihood of vigilantism, the most significant state agent is the police officer. In the words of Agamben, the police are “perhaps the place where the proximity and the almost constitutive exchange between violence and right that characterizes the figure of the sovereign is shown more nakedly and clearly than anywhere else”.²¹ It will be argued that state policing responses to community issues – both those that are potentially positive but misunderstood or misapplied, as well as those that are purely negative, misguided or even criminal – do indeed play a role in triggering and/or exacerbating vigilante violence.

²⁰ Scheper-Hughes & Bourgois *Violence in War and Peace* 1.

²¹ Agamben *Means Without End* 104.

4 2 1 Violence as universal societal language

“To those people who feel [vigilantism] is barbaric and against the law, I say: You people stay in safe houses protected by walls, electric fences and big dogs. You don’t know how it is to be helpless in front of the children while being bullied by criminals in your house ... Now I have put all my trust in the [vigilantes]. I’m convinced that they will help me. To me, the police are useless, I have no trust in them”.

– Vigilante supporter quoted in *Cape Times* 1998-08-24; adapted from Lee and Seekings “Vigilantism and Popular Justice After Apartheid” in Feenan (ed) *Informal Criminal Justice* (2003) 110.

Levels of (particularly violent) crime, people’s perceptions of crime and fear of crime, and the police response to crime are important determinants of state legitimacy. Bradford et al’s research on factors that contribute to police legitimacy in South Africa found that higher levels of worry about crime and personal experiences of victimisation were associated with lower levels of trust in both the effectiveness and fairness of the police, and, through these, with lower levels of legitimacy.²² It may seem trite to observe that vigilantism tends to take place in response to crime – after all, the premise of this study is that vigilante acts are not merely a private criminal activity, but a reaction to real and/or perceived deviance. However, it is necessary to emphasise that vigilantism can only properly be understood if one bears in mind that it does not occur in a vacuum, but is fundamentally a “localised, non-state response to a particular problem or set of problems that arise in a specific place and point in time”.²³ It should come as no surprise that vigilantism is most prevalent where (violent) criminal activity is rampant.²⁴ As was argued before

²² Bradford, et al. (2014) *Regulation & Governance* 258-259.

²³ M Sekhonyane & A Louw *Violent Justice: Vigilantism and the State’s Response* (2002) 27 (emphasis added).

²⁴ According to SAPS, a total of 17 805 murders were committed in South Africa between April 2014 and March 2015, an increase of 4,6% (782 deaths) on the previous year. In addition to 49 people being murdered every day, other violent crimes are also on the increase, for example armed robberies (up 8,5% to 129 045), attempted murder (up 3,2% to 17 537), common robbery (up 2,7% to 54 927) and house robberies (up 5,2% to 20 281). As regards other violent offences, sexual offences (down

the Khayelitsha Commission, vigilantism is at heart precipitated by oppressive and pervasive levels of criminal activity;²⁵ it is a consequence of the appalling lived reality of those who would otherwise feel powerless in the face of escalating and widespread violent crime.²⁶

The failure of the criminal justice system to protect communities from criminals is starkly illustrated by the SAPS' so-called "Bundu Courts Report", which showed that a significant proportion²⁷ of the 78 victims of vigilante killings reported in Khayelitsha between April 2011 and June 2012 who were positively identified had criminal records for crimes ranging from burglary and possession of stolen property to drug-related offences and murder. Tellingly, those killed by vigilantes had frequently been charged with many more offences than those of which they had been convicted, but the charges had later been withdrawn.²⁸ This perhaps speaks to the community's frustration, their fear and hopelessness, and their sense that taking the law into their own hands is the only feasible option when confronted with the, to them, inexplicable niceties and inefficiencies of the formal criminal justice system.²⁹

Furthermore, police officers investigating the vigilante incidents where witnesses were prepared to assist the police³⁰ most often reported that the

5,4% to 53 617) and common assault (down 2,8% to 161 486) showed slight downward trends, but were nevertheless still at high levels (SAPS "Crime Statistics: April 2014-March 2015" (2015-09-29) *South African Police Service* <http://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2015/crime_stats.php> (2015-11-17)).

²⁵ P Hathorn, N Mayosi & M Bishop "Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations Between the Community and Police in Khayelitsha: Complainant Organisations' Heads of Argument" *Khayelitsha Commission* <<http://www.khayelitshacommission.org.za/2013-11-10-19-36-33/2013-11-25-08-05-56/documents-to-be-relied-on-by-the-complainant-organisations.html>> (20-04-2015).

²⁶ For example, the Mthente survey, cited in the Khayelitsha Commission report, found that 41.3% of all respondents in the survey had personally been a victim of crime in the last year in Khayelitsha, and 8 out of 10 respondents reported not feeling safe in their own community (O'Regan & Pikoli *Khayelitsha Commission Report* 131-132).

²⁷ Thirteen of the deceased had pending or finalised criminal matters against them, several had been convicted of crimes, and many had had charges withdrawn against them (see O'Regan & Pikoli *Khayelitsha Commission Report* 216).

²⁸ See § 4 2 5 2 3 below for more on why cases might be withdrawn.

²⁹ See Minnaar "The 'New' Vigilantism" in *Informal Criminal Justice* 199-200; also A Minnaar (1999) *Criminological Society of South Africa International Conference: Crime Prevention in the New Millennium* "The New Vigilantism and Post-April 1994 South Africa: Crime Prevention or an Expression of Lawlessness?" 4. See also §§ 4 3 2 and 4 3 2 5 below for why the state due process model of criminal justice is found wanting by vigilantes and the communities that support them.

³⁰ These were in the minority. The more common scenario was one where no witnesses could be identified, although there were many persons near the scene. A typical extract from the case information reads as follows: "[SAPS members] noticed a group of community members that were

catalyst for the fatal attacks was that the vigilante victim was caught housebreaking or stealing. In one instance, where the target of the vigilantism had also been arrested for armed robbery previously, a constable on the scene chillingly describes the “blood trail from the house (where he apparently tried to break in) to the street where the body was found”.³¹ Feeling vulnerable and threatened, particularly by crimes where perpetrators penetrate the inner sanctum – the home – of their victims, “crystallize[s] people’s collective sense of insecurity”.³² Anxious community members in townships and squatter camps attempt to wrest back some semblance of control by mobilising against such threats. Resorting to vigilantism may in some instances indeed be a necessary, desperate last resort by citizens driven to despair by the state’s inability to respond adequately (or at all) to escalating crime rates.

This form of crime-control vigilantism is the easiest for vigilantes to justify, and may evoke considerable sympathy, even from the judiciary, since vigilantes’ desire to step in as state substitutes by administering justice where the long arm of the law cannot reach is eminently understandable.³³ An explicit link between high crime levels coupled with inadequate state protection, dearth of legitimacy and an increased likelihood of vigilantism is made in the English case of *R v Connor and another; R v Mirza*:³⁴

“A failure to convict a defendant whose guilt has been proved is a breach of the social contract between the state and its citizens. It is a failure of the state to provide to citizens the protection to which they are entitled against the criminal activities of others. It leads to a failure of public confidence in the justice system and the

standing not far from the victim’s body [who was lying on the ground with multiple lacerations and injuries], but none of them would give information as to what transpired.” (SAPS *Bundu Courts Report* (2012) 15). See also the research cited in O’Regan & Pikoli *Khayelitsha Commission Report* 403, where 90% of Khayelitsha residents said they would not feel safe reporting to the police that they had witnessed a crime.

³¹ SAPS *Bundu Courts Report* 4.

³² Smith *A Culture of Corruption* 171.

³³ See also Knox & Monaghan *Informal Justice in Divided Societies*.

³⁴ *R v Connor and another; R v Mirza* [2004] 1 All ER 925 para 132.

ability of the state to maintain [the peace]. It encourages vigilantes.”³⁵

As regards the need for the criminal justice system to deal appropriately with dangerous criminals in order to preclude people resorting to self-help, Gamble J in *S v Lunga* states:

“Ordinary members of the public, whether they reside in informal settlements, townships or leafy suburbs are all exposed to violent crimes of various descriptions on a regular basis. They look to the courts for protection against ruthless thugs like the accused and they are entitled to be protected from them. A failure by the courts to respond appropriately could result in vigilantism.”³⁶

Taking the above into account, it is unsurprising that the Khayelitsha Commission report endorsed the views of Prof Godobo-Madikizela, who testified that a “shared sense of grievance and anger amongst the community at the high levels of crime ... is one of the factors that makes vengeance attacks more likely”.³⁷

While fear of violent crime definitely plays a role in community members feeling justified in resorting to self-help, the degree and ubiquity of violence to which vigilante-prone communities are exposed goes beyond merely the fear of physical assault. Vigilante violence may not simply be a response to crime, but may indeed be a symptom of generally high levels of aggression in communities that condone violent behaviour as a justifiable and “normal” response” to frustration. Harris argues convincingly that the pervasiveness of violence as a “legitimate and primary form of interaction” is a powerful explanation both for vigilantism and for the widespread endorsement and tolerance of the conduct of those who regard violent self-help as an acceptable solution to the crime problem.³⁸ Likewise, Professor Kaminer testified before the Khayelitsha Commission to the effect that repeated exposure to violence leads to the normalisation of violence as a “socially and

³⁵ Para 132.

³⁶ *S v Lunga* 2012 JDR 0236 (WCC) para 35.

³⁷ O'Regan & Pikoli *Khayelitsha Commission Report* 337.

³⁸ Harris *As for Violent Crime That's Our Daily Bread* 38.

morally acceptable, appropriate and even honourable way of resolving conflicts and achieving goals”.³⁹ In truth, prevalent societal violence may be one of the effects of shared community trauma that is passed on from generation to generation. Prof Godobo-Madikizela testified before the Khayelitsha Commission as follows:

“[T]he culture of violence has been transmitted from the past, and continues to transform identities and to play out both as cultural memory and collectively shared traumatic memory ... [t]he feeling of exclusion, of being discarded members of society evokes the ‘memory’ of repression under *apartheid* – little or nothing has changed. The clarion call made whenever a thief is caught in action – *Nal’isela* (here is a thief!) – is reminiscent of the days when fingering a person as a police informer ... gave a community the mandate to ‘necklace’ the culprit”.⁴⁰

The probable link between structural violence and the likelihood of private resort to violent self-help in a setting where historical factors such as extreme poverty and social inequality make institutionalised oppression an everyday reality has already been alluded to.⁴¹ In a society where people become “ensnared in a cycle of violence and counterviolence”,⁴² and violence is sanctioned and utilised as an expressive response by state and citizen alike, it is to be expected that people would be more inclined to take the law into their own hands instead of resorting to official channels to address their grievances.

The likelihood of violent problem-solving occurring is increased where high levels of aggression in the past incline the state to deal more harshly with “normal” crime.⁴³ Excessive state force itself may be instrumental in establishing a society prone to violence. If the state is seen to devalue human life, dignity and physical integrity by condoning harsh investigative methods

³⁹ O’Regan & Pikoli *Khayelitsha Commission Report* 135.

⁴⁰ 344.

⁴¹ See § 4.2 above.

⁴² Snodgrass Godoy (2004) *Theory and Society* 643.

⁴³ Knox & Monaghan *Informal Justice in Divided Societies*.

and imposing expressive and retributive sanctions such as capital and corporal punishment, it serves as a negative role model for the rest of society. State punitiveness may lead to increased tolerance levels for the severe treatment of alleged offenders, and may ultimately also foster citizen willingness to incorporate such extreme violence into informal “justice-making”.⁴⁴

Once citizens have been thus desensitised, even if the state clamps down on police brutality and abolishes violent forms of punishment, public opinion may lag behind. Citizens’ punitive sentiments may persist despite the state extolling a human rights-based approach to dealing with disputes.⁴⁵ Indeed, communities where private violence is popularly endorsed may (consciously or unconsciously) socialise their youth into believing that taking the law into their own hands is a legitimate solution to problems.⁴⁶ Societies that have in the past successfully legitimated their recourse to violent punishment by appealing to ideological justifications such as the desire to maintain a sense of tradition, culture or custom,⁴⁷ the need for self-preservation, the right to revolution or the value of popular sovereignty⁴⁸ may be more prone to vigilantism at a later stage too.⁴⁹ It is thus clear that a societal “history of self-reliance, immediacy of response and punitive retribution” may have a considerable influence on contemporary attitudes to communal forms of violence such as vigilantism.⁵⁰

While these insights are useful for understanding why certain societies may be more prone to vigilantism than others, on its own the “culture of violence” conceptualisation of vigilantism provides too broad and all-encompassing a framework to explain vigilantism adequately. From this perspective, vigilantism is understood simply as one of many manifestations

⁴⁴ M Benevides & R Fischer Ferreira “Popular Responses and Urban Violence: Lynching in Brazil” in M K Huggins (eds) *Vigilantism and the State in Modern Latin America* (1991).

⁴⁵ See § 4 3 2 4 below for more on such second-order dissonance.

⁴⁶ D Kowalewski “Countermovement Vigilantism and Human Rights: A Propositional Inventory” (1996) 25 *Crime, Law and Social Change* 6364.

⁴⁷ See Harris *As for Violent Crime That’s Our Daily Bread* 37.

⁴⁸ See § 5 1 below.

⁴⁹ See Brown “The American Vigilante Tradition” in *The History of Violence in America*; Brown “The History of Vigilantism in America” in *Vigilante Politics*; and Little & Sheffield (1983) *American Sociological Review* for a discussion of this phenomenon in the context of the USA.

⁵⁰ Knox & Monaghan *Informal Justice in Divided Societies* 50.

of the pervasive use of force that is characteristic of a society where “violence remains the universal language”⁵¹ without considering vigilantes’ specific and nuanced justifications and motivations for resorting to violence. It therefore needs to be supplemented with other explanations of vigilantism that are more motive-driven so as to distinguish vigilantism from other forms of violence such as revenge killings, xenophobia and the violence engaged in by public protesters.

4 2 2 Vigilantism as a “frontier” phenomenon

Another explanation of vigilantism that relates to structural violence is the view that communities who take the law into their own hands do so chiefly in locales where the law’s enforcement capacity is for a variety of reasons “significantly diluted or resisted”.⁵² According to this paradigm vigilantism is a “frontier” phenomenon, tending to emerge where the state’s authority is less clearly recognised and adhered to by law-abiding citizens, criminals and vigilantes alike. The frontier may be spatial, with vigilantism being a response to the social chaos in regions at the periphery of the state’s power base,⁵³ or it may be a figurative “no go area”, where the effectiveness of state power in controlling crime is diluted due to difficulty of access combined with community alienation, tension and hostility. The following extract contains a good example of the latter scenario:

“We arrived to a large circle of people standing in the dark. Inside the circle was a middle-aged woman holding a sjambok; a young man, bleeding quite heavily, kneeled in front of her. The crowd parted for the two police officers. They picked the beaten man off the ground and put him in the back of their van. The crowd showed no dissatisfaction. Clearly, the police had only been called in the first place because the crowd was happy that

⁵¹ Snodgrass Godoy (2004) *Theory and Society* 643.

⁵² Abrahams *Vigilant Citizens* 24.

⁵³ E.g. 19th century vigilantism on American western frontier (Brown “The American Vigilante Tradition” in *The History of Violence in America*; Brown “The History of Vigilantism in America” in *Vigilante Politics*).

sufficient 'community justice' had already been meted out ... *The Reiger Park police had little desire to police Jerusalem. Its roads were impassable, its people volatile, and, in the absence of electricity, it was positively dangerous after dark. They were thus quite happy for Obese [the Community Policing Forum representative wielding the sjambok] to police the settlement for them. Obese, in turn, acquired protection from the police.*⁵⁴

This vignette depicts the state agents involved as being perfectly content to cede their security-providing functions to members of this marginalised community, and there appears to be a quid pro quo relationship between the police and the vigilantes as regards security provision.

The inaccessibility of formal justice – spatially, financially, symbolically – is a common refrain in literature on why people resort to vigilantism. It is not only practical considerations such as poor lighting and lack of proper roads and maintained pathways⁵⁵ that isolate these “forgotten”⁵⁶ and neglected communities from proper police protection. According to Steinberg, the little formal crime-prevention policing that does take place in South African townships still bears “ominous resemblance to apartheid policing”.⁵⁷ The police focus does not appear to be to fulfil the two vital functions that “nobody else in the field of crowded urban security” can serve, namely investigating crimes professionally and efficiently, and providing rapid and fair interventions for citizens in emergency situations.⁵⁸ Instead, the SAPS’s paramilitary-style⁵⁹ “policing for risk” strategy entails “taking to the streets with aggression” in order to get guns off the streets, and policing the consumption of alcohol. Steinberg concludes:

⁵⁴ J Steinberg “Perpetually Half-Formed? State and Non-State Security in the Work of Wilfried Schärf” (2009) 22 (2) *Soth African Journal of Criminal Justice* 162 172-173 (emphasis added).

⁵⁵ See Hathorn, et al. “Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations Between the Community and Police in Khayelitsha: Complainant Organisations’ Heads of Argument” *Khayelitsha Commission* 372.

⁵⁶ Martin (2010) *Acta Criminologica* 61.

⁵⁷ J Steinberg “Establishing Police Authority and Civilian Compliance in Post-Apartheid Johannesburg: An Argument from the Work of Egon Bittner” (2012) 22 (4) *Policing and Society* 481 491.

⁵⁸ 490.

⁵⁹ See also Steinberg’s evidence about policing to the Khayelitsha Commission (O’Regan & Pikoli *Khayelitsha Commission Report* 298-299).

“[F]or black urban South Africans, too little [has] changed. The vital functions of keeping peace among strangers [are] still radically underprovided [by the formal criminal justice system]. People thus [have] little reason to abandon private sources of security for the police.”⁶⁰

While this perspective may be over-pessimistic, it does point to the considerable hurdles that the police need to overcome in order to be perceived as legitimate justice providers to those on the margins.

In accordance with the notion of structural violence posited earlier, the “social web of exploitation”⁶¹ engendered by poverty and inequality is borne out in the criminal justice sphere too. Vigilante-prone “frontier zones” may not simply be at the geographical periphery, but may in fact emerge as a result of a calculated and/or historically entrenched criminal justice policy to expend scarce law-enforcement resources in manner that is biased in favour of the wealthier sections of society. For instance, the Khayelitsha Commission heard that according to a 2011 Barometer survey, 69,2% of respondents in Khayelitsha Site B and 66,2% of respondents in Harare said that it was difficult or very difficult to access the police.⁶² There can be no doubt that Schönteich et al are correct in their view that the density of police personnel – and their willingness to intervene in violent situations – is lower in economically poor areas and in areas inhabited by ethnic and racial groups with little economic power, than in more affluent areas.⁶³ Benevides and Fischer Ferreira concur that vigilante violence is “part and parcel of economic marginalization”.⁶⁴

Community members’ mistrust of the police is thus exacerbated by their lived experience that there is one law for the poor and one for the rich,

⁶⁰ It is necessary to supplement this negative perspective of township policing with a consideration of initiatives where the police have indeed tried to engage positively with marginalised communities. For more in this regard, see §§ 7 4 3 and 6 2 3.

⁶¹ Farmer (2004) *Current Anthropology* 317.

⁶² O’Regan & Pikoli *Khayelitsha Commission Report* 403.

⁶³ M Schönteich, A Minnaar, D Mistry & K Goyer *Private Muscle: Outsourcing the Provision of Criminal Justice Services* (2004) 23.

⁶⁴ Benevides & Fischer Ferreira “Popular Responses and Urban Violence: Lynching in Brazil” in *Vigilantism and the State in Modern Latin America* 41.

and this heightens their sense of having been forsaken by the formal criminal justice system.⁶⁵ A perception that the criminal justice system is the exclusive preserve of the privileged may prejudice the economically marginalised against using official channels to deal with crime, and lead to a state of affairs where there is a “popular desire to rectify radical inequalities in the application of law”⁶⁶ through the use of self-help. Black opines that self-help may be a mechanism to mobilise the law among those who might otherwise be ignored – that it may “serve as a cry for help from people who are less capable of attracting legal attention without it”.⁶⁷ Similarly, Kriegler J warns lawyers against “throw[ing] their hands up in horror at ‘people’s courts’, as they represented a form of self-help by people who had been deserted by the law”.⁶⁸

Neglected by public security providers and unable to afford the expensive, customised protection on offer from the commercial private security sector, what option is there for community members but to resort to less savoury means of non-state policing? Township dwellers do not have the luxury of “build[ing] a ‘protective cocoon’ around themselves”⁶⁹ by paying for burglar alarms or armed response. Having more time on their hands than money, and faced with a dearth of formal policing, the poor and marginalised have little choice but to police themselves⁷⁰ – with potentially fatal consequences for the targets of their policing endeavours. For those living on the periphery of the formal state apparatus, there is only one ubiquitous and

⁶⁵ See also Minnaar *The New Vigilantism and Post-April 1994 South Africa: Crime Prevention or an Expression of Lawlessness?* 5, who opines that people are prejudiced against using formal channels for reporting crime due to the perception that the established legal system is for “whites only”, since it was previously used as a tool for state repression.

⁶⁶ Benevides & Fischer Ferreira “Popular Responses and Urban Violence: Lynching in Brazil” in *Vigilantism and the State in Modern Latin America* 41.

⁶⁷ Black “Crime as Social Control” in *Towards a General Theory of Social Control Volume 2: Selected Problems* 18.

⁶⁸ Extracts from *S v Booie and others*; *S v Sepati and others*, George Regional Court cases 404/91 and 405/91, quoted in J Seekings “The Revival of ‘People’s Courts’: Informal Justice in Transitional South Africa” (1992) 6 *South African Review of Sociology* 186 193.

⁶⁹ I Loader “Consumer Culture and the Commodification of Policing and Security” (1999) 33 (2) *Sociology* 373 381.

⁷⁰ See also K Gottschalk 2005 *Vigilantism v. the State: A Case Study of the Rise and Fall of Pagad, 1996-2000* Institute for Security Studies 2.

viable option for accessing justice and addressing issues of security and moral order: the vigilante.⁷¹

Buur goes so far as to say that townships have become “spaces of exception; spaces in which the law is, if not completely suspended, then, at least, enforced primarily by local justice structures that are governed by values and practices other than human rights and due process”.⁷² Buur’s perspective touches on an important aspect of the “frontier” quality of vigilantism that will be discussed in depth when the incompatibility of state and citizen law-enforcement beliefs is elaborated on in § 4 3 below, namely Abrahams’ insight that a frontier does not need to be spatial, but may be internal, with the problem being “one of reaching hearts and minds rather than actual places”.⁷³

The narrative sketched above portrays the state as having left “frontier” communities to their own crime-control devices by having failed to provide them with adequate security guarantees. However, as will now be explained further, by simultaneously encouraging community members to police themselves, the state may – by design or default⁷⁴ – have ended up legitimating claims by community members to fight crime informally in the interests of the community.⁷⁵

⁷¹ Buur (2008) *Review of African Political Economy* 583; Martin (2010) *Acta Criminologica* 61.

⁷² Buur (2003) *Anthropology and Humanism* 35.

⁷³ Abrahams *Vigilant Citizens* 169.

⁷⁴ Lund (2006) *Development and Change* 692.

⁷⁵ Comaroff & Comaroff “Popular Justice in the New South Africa” in *Legitimacy and Criminal Justice: International Perspectives* 217.

4 2 3 “Police yourselves”

Ironically, the perception of poor and marginalised communities that they alone are responsible for their own security has unwittingly been given impetus by state policing trends. This has occurred mainly by way of the late modern state’s “responsibilisation” strategy.⁷⁶ It is based on a neoliberal⁷⁷ economic model of “governing-at-a-distance”⁷⁸ that emphasises the need for the state to outsource public goods and services⁷⁹ – security and law enforcement among them⁸⁰ – to agencies, organisations and individuals that operate outside of the state.⁸¹ In respect of law enforcement this entails the “criminal justice state ... shedding its ‘sovereign’ style of governing” and enlisting the “governmental” powers of private sector actors in its quest to control crime.⁸² This governance strategy is sold to communities as a means of empowering them to regain control over their direct environment, and imposes on them the duty to participate actively in the provision of their own security.⁸³ Rather than citizens being mere passive consumers of what is on offer from the police, responsibilisation reimagines them as “self-calculating, risk-monitoring consumers of security technology and services”.⁸⁴ They are encouraged to engage in a variety of productive security activities⁸⁵ to manage their own crime risks⁸⁶ themselves, which may include participating in Community Policing Forums (“CPFs”), neighbourhood watches (“NWs”) and citizen street patrols.

Although it is arguably laudable for the state to have recognised the limits of its sovereign monopoly on the use of force in favour of an outlook that recognises the “dispersed, pluralistic nature of effective social control”,⁸⁷ in the

⁷⁶ Garland *Culture of Control* 124.

⁷⁷ See chapter 2 n 195 for more on neoliberal strategies in this context.

⁷⁸ Garland *Culture of Control* 127.

⁷⁹ Pratten (2008) *Africa* 4.

⁸⁰ Comaroff & Comaroff “Popular Justice in the New South Africa” in *Legitimacy and Criminal Justice: International Perspectives* 217.

⁸¹ See also Schönteich, et al. *Private Muscle: Outsourcing the Provision of Criminal Justice Services* 8.

⁸² Garland *Culture of Control* 124; 125.

⁸³ Bénit-Gbaffou (2006) *Urban Forum* 310-311; R Abrahamsen & M C Williams “Introduction: The Privatisation and Globalisation of Security in Africa” (2007) 21 (2) *International Relations* 131 135.

⁸⁴ Loader (2000) *Social and Legal Studies* 331.

⁸⁵ Johnston (2001) *Urban Studies* 965.

⁸⁶ Loader (1999) *Sociology* 377.

⁸⁷ Garland *Culture of Control* 126.

context of already vigilante-prone communities this strategy of “outsourcing security”⁸⁸ has the potential to backfire very badly.⁸⁹ Johnston’s distinction between “responsible” citizenship, which is sanctioned – “responsibilised” – by the state, and “autonomous” citizenship, where there is no such state support, is relevant once more.⁹⁰ Johnston correctly identifies a risk inherent in the state mobilisation of the public to engage in acts of responsible citizenship, namely that this might inadvertently promote alternative modes of autonomous citizenship too, of which vigilantism is one.⁹¹

The “community policing” model that is sometimes extolled as being the new “one-size-fits-all” strategy for addressing the ills of the police service has its own difficulties when imported into an African context.⁹² As will be shown in chapter 7, initiatives such as CPFs, intended to deal with the delegitimation gap by enhancing the project of community policing and building good relations between the police and the community, have largely not fulfilled their promise.⁹³ Also, *prima facie*, community policing denotes policing by the community, with the precise meaning of ‘community’ being left undefined.⁹⁴ It would be eminently understandable for community members, abandoned by state law-enforcement agents and already steeped in a tradition of self-help, to equate community policing with (bottom-up)

⁸⁸ Pratten (2008) *Africa* 4.

⁸⁹ See also Sundar (2010) *Critique of Anthropology*, who draws a link between the outsourcing of security and a resurgence in vigilantism in India.

⁹⁰ See also § 2 5 2 above.

⁹¹ Johnston (2001) *Urban Studies* 967.

⁹² See, e.g. M Brogden “Implanting Community Policing in South Africa: A Failure of History, of Context and of Theory” (2002) 24 *Liverpool Law Review* 157; M Brogden “Commentary: Community Policing: A Panacea from the West” (2004) 103 (413) *African Affairs* 635; M Brogden ““Horses for Courses” and “Thin Blue Lines”: Community Policing in Transitional Society” (2005) 8 (1) *Police Quarterly* 64. See chapter 7 for an in-depth discussion of community policing initiatives and their potential to harness vigilante crime-fighting energies.

⁹³ See O’Regan & Pikoli *Khayelitsha Commission Report* 411-412; also L Buur “Sovereignty & Democratic Exclusion in the New South Africa” (2005) 32 (104/105) *Review of African Political Economy* 253 for a critique of the democratic model embodied by CPFs in practice. There is a critical discussion of the practical application of CPFs at § 7 4 2, so this topic is not considered in depth here.

⁹⁴ Comaroff & Comaroff “Popular Justice in the New South Africa” in *Legitimacy and Criminal Justice: International Perspectives* 217. See Buur (2005) *Review of African Political Economy* 259-261 for more on the ambivalent nature of the concept of “the people” in the context of community policing.

vigilantism, with the state appeal for more (top-down) community policing providing a measure of legitimation for their violent self-help activities.⁹⁵

Numerous authors are of the view that the excessive degree of privatisation of security has indeed given license for “irresponsible” forms of citizenship such as vigilantism to flourish.⁹⁶ These include Lund, who notes that this outsourcing strategy may account significantly for the “blurring of the boundary between public and private”,⁹⁷ and Evans, who regards responsabilisation as potentially precipitating a “collapse of a meaningful distinction between vigilance and vigilantism”.⁹⁸ Buur also opines that the state implicitly incorporates vigilante groups into its security provision by its *de facto* outsourcing of popular sovereignty to the community,⁹⁹ while Kirsch views vigilantism as a “side-effect” of applying democratic principles in semi-private crime-prevention associations.¹⁰⁰ Most articulate in this regard is Bénit-Gbaffou. In her analysis of the South African state’s promotion of community policing, she identifies as worrisome the confusion occasioned by contradictory public discourse about responsabilisation: the state appeals to the public to patrol the streets, whilst simultaneously appearing to condemn vigilantism. This, she says, legitimises the contestation of the Bill of Rights at grassroots level: “Constitutional principles have little meaning in situations where communities have been granted rights to apprehend the ‘criminal’”.¹⁰¹ According to her, there is also a lack of satisfactory engagement with public authorities regarding how to solve the local security problems that communities have been encouraged to identify during the course of CPF initiatives.¹⁰² This not infrequently results in people taking the law into their

⁹⁵ See also D Wisler & I D Onwudiwe “Community Policing in Comparison” (2008) 11 (4) *Police Quarterly* 427 for more on “bottom-up” as opposed to “top-down” community policing.

⁹⁶ See Bidaguren & Nina (2004) *Social Justice* 173.

⁹⁷ Lund (2006) *Development and Change* 692.

⁹⁸ J Evans “Vigilance and Vigilantes: Thinking Psychoanalytically about Anti-Paedophile Action” (2003) 7 (2) *Theoretical Criminology* 163 165.

⁹⁹ L Buur “The Sovereign Outsourced: Local Justice and Violence in Port Elizabeth” in T B Hansen and F Stepputat (eds) *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* (2005) 211.

¹⁰⁰ T G Kirsch “Violence in the Name of Democracy: Community Policing, Vigilante Action & Nation-Building in South Africa” in T G Kirsch and T Grätz (eds) *Domesticating Vigilantism in Africa* (2010) 142.

¹⁰¹ C Bénit-Gbaffou “Community Policing and Disputed Norms for Local Social Control in Post-Apartheid Johannesburg” (2008) 34 (1) *Journal of Southern African Studies* 93 101; 108.

¹⁰² For more on CPFs, see from § 7 4 1 below.

own hands “using whatever means within their reach – vigilantism for the poorer or security villages for the wealthier”.¹⁰³

With reference to case law, *Mkhize v S*¹⁰⁴ is a classic illustration of the manner in which what appears to be an instance of the outsourcing of state responsibility can go terribly wrong. The accused, the chairperson of the local CPF, was convicted of the murder, attempted murder, kidnapping and assault of two men who were suspected of robbing and raping two female teachers. According to his testimony, having been told who the suspects were, police instructed the CPF members “to go and look for the suspects themselves”, by which Mkhize inferred that what was expected of him was to “get” them and take them to the police station. After being “arrested”, the suspects were questioned to obtain information about their involvement in the crime, during the course of which CPF members beat them so severely that one died of his wounds. When testifying about why they did not take the suspects to the police station immediately after “arresting” them, a fellow CPF member said that he only wanted to call the police when he was sure about whether they had the:

“wrong people or right people ... [T]he police said they can't arrest people if they have no physical evidence so that is why we didn't call the police by that time we wanted to take them to the place where the goods were kept, the stolen goods were kept, then call the police in order to tell them that here are the suspects and the stolen goods.”¹⁰⁵

Whether or not their perception was correct, these “responsibilised” CPF members had clearly formed the impression that the police would only act against the wrongdoers once the CPF had done a complete criminal investigation themselves, and that it was their duty to obtain the necessary evidence for conviction no matter what the human cost.

¹⁰³ Bénit-Gbaffou (2006) *Urban Forum* 320.

¹⁰⁴ *Mkhize v S* [2009] JOL 24118 (KZP), especially paras 11-13.

¹⁰⁵ Para 13.

The dangers of responsabilisation are fully acknowledged in *S v Hena and another*¹⁰⁶ where on the facts, an investigating officer advised the complainant to approach a (vigilante) anti-crime committee to deal with her issue, which concerned the theft of a cell phone. Anti-crime committee members ended up interrogating and assaulting one of the accused until he produced the stolen cell phone. Plasket J pointedly criticised this “abdication of responsibility on the part of the police”, holding that this “privatising” of their investigative functions was in violation of s 205(3) of the Constitution, which places the duty on *the police service* to “prevent, combat and investigate crime”. He concluded that by “sub-contracting” their investigative role, the police were complicit in the subsequent fundamental rights violation perpetrated by the anti-crime committee, and declared that the evidence obtained by the vigilantes should be excluded on the grounds that it was unconstitutionally obtained.¹⁰⁷

To conclude, in many instances the South African state’s policy of responsabilisation seems irresponsible and ill-conceived, especially considering the social circumstances in which it is taking place. As Bénit-Gbaffou puts it, “can one give residents the duty to ensure their own neighbourhood’s security, and refuse them the right to exclude [potentially by violent means] whomever they consider a threat (or even a risk) to their own local social order?”¹⁰⁸ However, this pessimistic conclusion regarding responsabilisation does not imply that the potential crime-fighting authority of “autonomous” citizens should not – and cannot – be co-opted by the state. Possible means of doing so in a more context-sensitive way are explored further from § 7 4 below.

¹⁰⁶ *S v Hena* 37H.

¹⁰⁷ 40E-H; 41G-I; 42A-B.

¹⁰⁸ Bénit-Gbaffou (2006) *Urban Forum* 310.

4 2 4 Understanding the link between lack of due performance, delegitimation and support for vigilantism

Social conditions that are conducive to vigilantism – among them high levels of violence, poverty, inequality and marginalisation – have been considered above, as has the impact of the state strategy of outsourcing its policing and security provision to the community. The focus now shifts to conduct engaged in by state agents – most particularly the police as the “most high-profile representative of the criminal justice system”,¹⁰⁹ but also the judiciary – that may foster or facilitate vigilantism (or, conversely, discourage it). Baker strikingly describes Africans as being compelled to police themselves when confronted by what he terms the “predatory state”, which is characterised by inefficiency, bias, corruption, exploitation, criminality and violence.¹¹⁰ The present examination of the state inability to comply with the “due performance” component of legitimacy in the criminal justice sphere is threefold, focusing on ineffectiveness, procedural injustice and deliberate wrongdoing. The underlying premise is still that vigilantism is to a great extent a symptom of a state normative legitimacy deficit, particularly owing to the inadequate security guarantees that the state provides to its citizens.

There is empirical evidence supporting this premise, with research corroborating the assumption that perceptions of state legitimacy are linked with levels of procedural justice, as well as evidence that police effectiveness plays an important role in determining whether citizens view the state as being legitimate.¹¹¹ Tankebe’s Ghanaian study on public support for vigilante self-help concluded that normative assessments relating to trustworthiness of the police, as opposed to instrumental assessments concerned with police effectiveness, were “fundamentally linked” with support for vigilantism.¹¹² A

¹⁰⁹ J Jackson, A Z Huq, B Bradford & T R Tyler “Monopolizing Force? Police Legitimacy and Public Attitudes toward the Acceptability of Violence” (2013) 19 (4) *Psychology, Public Policy, and Law* 479 490.

¹¹⁰ Baker *Lawless Law Enforcers in Africa* 40.

¹¹¹ It must be noted that, for the most part, these studies use legitimacy measures that focus on establishing *belief in* legitimacy, *à la* Tyler, as opposed to normative legitimacy itself in Beetham’s sense. Nevertheless, there is no reason why their conclusions should not be regarded as an indication of the extent to which the “due performance” criterion of normative legitimacy is (or is not) complied with.

¹¹² J Tankebe “Self-Help, Policing and Procedural Justice: Ghanaian Vigilantism and the Rule of Law” (2009) 43 (2) *Law and Society Review* 245 259-260.

Dutch study by Haas et al found that the greater the confidence in the police, both as regards police results (effectiveness) and their degree of responsiveness, the less support there was for vigilantism (although in this first world context, there was very little overall support for vigilantism in any event).¹¹³ A core finding of the study of Jackson et al concerning the attitudes of London youth to the use of violence to achieve social change and social control was that judgments about police legitimacy – with procedural justice being a crucial component – were negatively correlated with individual attitudes towards private violence for social control and social change.¹¹⁴ Citing an IDASA study about support for vigilante group PAGAD, Sekhonyane and Louw note that those who voiced disapproval of overall and specific performance of South African law enforcement institutions were more willing to engage in violent collective action. The same applied to people who felt that they had been treated unequally by the police or courts and to those who felt less safe at home or in their neighbourhood.¹¹⁵ A more recent study by Bradford et al explicitly omits including the take-up of private security options from the study of factors influencing police legitimacy in South Africa, although the authors speculate that resorting to private security measures – including vigilantism – may be a result of low police legitimacy rather than its cause.¹¹⁶ As has already been noted,¹¹⁷ they found that trust in both procedural justice and efficacy is correlated to police legitimacy, with “perceived effectiveness of the police, rooted in anxieties and experiences of crime” seemingly playing the more significant role.¹¹⁸

It is clear from the above research that a state’s inability to secure basic levels of protection for all members of the community – to give everyone a “fair share of scarce security resources”,¹¹⁹ and to do so in an equitable and trustworthy manner – may undermine state legitimacy and make communities

¹¹³ N E Haas, J W De Keijser & G J Bruinsma “Public Support for Vigilantism, Confidence in Police and Police Responsiveness” (2014) 24 (2) *Policing and Society* 224 235.

¹¹⁴ Jackson, et al. (2013) *Psychology, Public Policy, and Law* 490.

¹¹⁵ Sekhonyane & Louw *Violent Justice* 11-12.

¹¹⁶ Bradford, et al. (2014) *Regulation & Governance* 253.

¹¹⁷ See §§ 3 2 2 and 3 7 above.

¹¹⁸ Bradford, et al. (2014) *Regulation & Governance* 259-260.

¹¹⁹ I Loader “Thinking Normatively About Private Security” (1997) 24 (3) *Journal of Law and Society* 377 383.

more prone to vigilantism. What follows is a more detailed exposition of various ways in which the criminal justice system has failed to meet citizen expectations relating to security provision and protection. It also contains some speculation as to how such failure may spark a tendency towards violent self-help. The aim is not to discuss all instances of state failure in exhaustive empirical detail, but rather to give an overview of prevalent shortcomings and difficulties, as well as some real-life examples of the types of problems marginalised people face, so as to better understand why they might feel justified in resorting to vigilantism.

4 2 5 State inefficiencies contributing to state delegitimation

“The police are useless. Our faith in them is gone.”

— Khayelitsha resident quoted in O’Regan and Pikoli *Khayelitsha Commission Report* 343.

“If only the police would do their job the people in the community wouldn’t *have to* take the law into their own hands. I mean they are not doing anything from what I can see.”

— Zandspruit resident quoted in Martin (2012) *State Crime* 229.

These quotes underscore a discourse that depicts vigilantism as being a necessary response to a “policing gap” left by failing authorities, with the community’s trust in the police being eroded to such an extent that they feel compelled to resort to self-help. There are various factors contributing to this sense that vigilantism is due to inadequate criminal justice service provision, each of which is discussed separately below.

4 2 5 1 Resource constraints

“[T]he reality is there is not enough hours in a day, there is not enough days in a week, there is not enough investigators”.

— Colonel Marais, Detective Commander of the Khayelitsha Site B police station, quoted in O’Regan & Pikoli *Khayelitsha Commission Report* 365.

Insufficient resources, both human and financial, may obstruct the state’s ability to fulfil citizens’ law-enforcement expectations that the police should deal competently with ubiquitous violent crime. For instance, factors such as a lack of police vehicles to respond to crime calls, officers ill-equipped for performing functions such as crime-scene management¹²⁰ and/or officers who lack the necessary professional skills and competencies¹²¹ due to poor training, may hinder service provision and diminish the likelihood of effective crime-detection and visible pro-active policing. The Khayelitsha Commission report notes that in many of the most crime-ridden areas there is simply insufficient manpower to perform adequately such crucial tasks as the patrolling of informal neighbourhoods and basic detection.¹²² Resource-related constraints may be especially acute in deep rural “frontier zones”, where police-citizen contact is further impeded by a lack of infrastructure, logistical problems, geographical isolation and inaccessible topography. If cases are indeed investigated and come to trial, courts have difficulty in processing cases due to factors such as the failure of police to take dockets to court,¹²³ with delays being frequent and a low proportion of the number of

¹²⁰ See O’Regan & Pikoli *Khayelitsha Commission Report* 377-379, where the problem of inadequate crime scene management is discussed. Some of the resource-related issues identified were the failure to provide all patrol vehicles with basic low-cost crime scene equipment such as barrier tape, protective garments and gloves; that SAPS members are not properly trained in crime scene management; environmental challenges to cordoning off crime scenes; and the absence of adequate lighting at crime scenes, which could be remedied by providing halogen lights and small generators to crime scene teams.

¹²¹ Martin (2012) *State Crime* 223.

¹²² See O’Regan & Pikoli *Khayelitsha Commission Report* chapter 13 for more details.

¹²³ 368-370; see also 164-165. The reasons given by the Director of Public Prosecutions (“DPP”) for not bringing dockets to court timeously were all ostensibly resource-related – e.g., that the dockets are locked in an office, that the investigator is not on duty to bring them to court after working a night shift, and that there is no vehicle to transport the dockets to court. The DPP dismissed the

cases recorded being successfully prosecuted. The Khayelitsha Commission report observes that a successful conviction is achieved in only a tiny proportion of cases reported to the SAPS – a shocking 0.5% of the cases reported to the Harare police station, for instance.¹²⁴ This state of affairs is compounded where citizens feel unable to access the services of the judicial system due to poverty and a feeling of being alienated from an over-formal and complicated formal justice system.¹²⁵

Binns-Ward J eloquently acknowledges that a lack of resources and a poorly functioning criminal justice system could precipitate self-help. In *S v Dikqacwi*, while sentencing the accused for vigilantism-related offences, he remarks:

“It is evident that the crimes were committed in a peculiar social context. The commission of the crimes is *a manifestation of a broad problem affecting a large section of South African society, notably those living in the widely impoverished, densely populated and under-resourced townships in our cities like Khayelitsha and Philippi, that is of persons in communities taking over and carrying out themselves the functions that in a properly functioning society would be discharged by the criminal justice system – the police and the courts ...* [V]igilantes are seen by many in the communities in which the phenomenon of vigilantism and mob justice occurs as upstanding and respectable members of the community, and indeed see themselves as serving the interests of their community. On reflection, even if wholly unacceptable, *this much is understandable in the context of a perception by a community that the formal and constitutionally established criminal justice system is not functioning.*”¹²⁶

option of securing dockets in a “strong room” or implementing an electronic docket system as unfeasible.

¹²⁴ 364.

¹²⁵ See Bidaguren & Nina (2004) *Social Justice*; Sekhonyane & Louw *Violent Justice*; and para 6 2 1 below.

¹²⁶ *S v Dikqacwi and others* Case no. SS49/2012; decided 2013-04-15 (WCC) para 4; 6 (emphasis added).

By recognising the role that the failing formal criminal justice system plays in precipitating vigilantism, Binns-Ward J finds himself in the uncomfortable position of viewing vigilantism as both “wholly unacceptable” and “understandable” – a dilemma that is all too familiar to anyone engaged in a more than superficial scrutiny of vigilantism.

4 2 5 2 *State lethargy*

It is justifiably difficult for an overburdened and cash-strapped criminal justice system to deliver a service to the public that will promote confidence in the legal process and counteract the fears and frustrations resulting from rising crime levels. However, where the performance of police or judicial officers is ineffective due to their own blameworthy conduct, not factors beyond their control, state failure to maintain order and security may be particularly likely to cause loss of faith in formal justice and to incite citizen opposition, including vigilantism.

Vigilantism is sometimes justified as being a “necessary and inevitable reaction to police lethargy”¹²⁷ – an attempt to awaken the police “sleeping on the job”,¹²⁸ as it were. 76% of the 170 complaints against police that the Khayelitsha Commission admitted to the record related to “poor service”, so it seems that police indolence and neglect is clearly a pressing issue.¹²⁹ Such police negligence can manifest itself in a variety of ways, some of which will now be detailed.

¹²⁷ Harris *As for Violent Crime That's Our Daily Bread* 22.

¹²⁸ L Johns (1999) *SASA Congress: Securing South Africa's Future* “Vigilantism: The Future of South Africa's Security?”.

¹²⁹ O'Regan & Pikoli *Khayelitsha Commission Report* 103-104.

4 2 5 2 1 Slow response times

“They came here and they stole everything in my house ... but the police took time to come. So I just lost my temper. I was angry and that’s when I called the people and we attacked them [the suspected offenders]. But maybe if the police had come in time maybe we wouldn’t have beaten those people up.”

– Zandspruit resident quoted in Martin (2012) *State Crime* 228-229.

A common complaint is the failure of police to respond to citizens’ requests for assistance and service within a reasonable time, with poor response times also being highlighted as an issue by the Khayelitsha Commission report.¹³⁰ In *S v Mvabaza*,¹³¹ for example, the court details a vigilante scenario where the police were telephoned on three occasions by one of the accused, whose friend also reported the incident in person at the Khayelitsha police station. The police arrived on two occasions; on the first, they simply left when they found a crowd of bystanders, and by the time they arrived a second time it was too late to save the victim.¹³² In imposing sentences for kidnapping and assault with the intent to do grievous bodily harm, Nyman AJ evidently considered the police failure “to carry out one of its primary constitutional duties of crime prevention”¹³³ as a relevant factor in mitigation of punishment. Taking into account “that poor policing has caused the accused to lose faith in the criminal justice system and impose justice in

¹³⁰ 360; see also Hathorn, et al. “Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations Between the Community and Police in Khayelitsha: Complainant Organisations’ Heads of Argument” *Khayelitsha Commission* 355. Of the 170 complaints admitted to the record of the Khayelitsha Commission, 18% related to SAPS’s failure to respond promptly to calls for help (O’Regan & Pikoli *Khayelitsha Commission Report* 103-104).

¹³¹ *S v Mvabaza and others* Case no. SS62/2012; decided 2013-06-07 (WCC).

¹³² Para 8.

¹³³ Para 8.

their own way”,¹³⁴ he imposed wholly suspended sentences, combined with correctional supervision.

4 2 5 2 2 Lack of police action and initiative

“I think if the police could take people’s grievances seriously, report their case and the police would make sure that the case was handled properly then there wouldn’t be a need for mob justice.”

– Zandspruit resident quoted in Martin (2012) *State Crime* 223.

Another frequent community grievance that may give rise to vigilantism relates to police failure to take action, to open dockets or to investigate cases brought to them, and that such investigation as is undertaken is of a very poor quality.¹³⁵ Instances of non-investigation accounted for 43% of the complaints before the Khayelitsha Commission.¹³⁶ For example, the Commission refers to the evidence of one Ms DG, who was accosted and assaulted by a man who attempted to strangle her and beat her repeatedly. She was assisted by two bystanders, who themselves began to beat the perpetrator. A police van that was driving past was stopped, and the officers transported her and her assailant to the hospital (in separate vans). When she eventually recovered from her injuries and inquired at the police station about what had become of the perpetrator, Ms DG discovered that no case had been opened and that the police had only been sent to the scene to break up a fight. She was also not informed that she could lay a charge against him. As a result of this treatment, she declared, “I am very angry at the police for the way my assault was handled. I feel unsafe all the time in Khayelitsha and the man who

¹³⁴ Para 9.

¹³⁵ The Khayelitsha Commission’s analysis of a random sample of 25 complaint dockets confirmed that the quality of detective work was very poor (O’Regan & Pikoli *Khayelitsha Commission Report* 219).

¹³⁶ 103-104.

assaulted me nearly beat me to death, and he has not been punished.” She also stated that, “I do not see what the purpose of the police in Khayelitsha is, if they cannot even deal with a case like this, where the perpetrator was in their custody and there were two witnesses.”¹³⁷

This account is instructive: the police perceived their role simply to be to deal with an affray, rather than to obtain evidence to open a criminal case either against the initial assailant, or against those who assaulted him. It also illustrates the pervasiveness and routine nature of the violent vigilante response: Ms DG glosses over the bystanders’ beating up of the perpetrator as being unremarkable “assistance”. Lastly, it exposes the police’s exacerbation of their initial lethargy in that they did not even inform Ms DG that she could lay a criminal complaint against her assailant.

Another Khayelitsha Commission narrative that powerfully articulates the seeming unwillingness of police to do their job is that of Ms Vuyiswa Mpekweni. Her niece and three children had died in an informal shack fire that was deliberately set by her niece’s husband, who went to the police and confessed his involvement. He appeared in court once, but was released because the docket had been mislaid; he subsequently moved to Johannesburg. Ms Mpekweni went to the police station to inform them of this, and took along a photograph of the perpetrator to assist the police. She testified:

“I then met that detective and gave him this picture. I told him that I had not heard anything about this case. The detective then asked me if I knew where in Johannesburg [the perpetrator] was. I told him that I didn’t know exactly where but I heard that he was in Johannesburg, and the detective said to me that I should try and investigate exactly where in Johannesburg he was, because Johannesburg is big. That day I left just like that, but my heart was broken, because at this time he was making me do the work of the police ... ever since they asked me to investigate exactly

¹³⁷ 102-103.

where he was in Johannesburg, that is where I lost trust in the police and told myself that I was leaving it.”¹³⁸

A suspect was finally arrested and appeared in court in July 2014, seven years after the initial incident. A cynical – but not unjustified – inference is that the impetus behind the renewed investigation was the Khayelitsha Commission’s asking SAPS to make the docket available in January 2014.

4 2 5 2 3 Missing dockets

“Because the people are tired of the services they are getting from the police they end up taking the law into their own hands. There is a guy who killed a lot of people last year... he was handed over to the police. Later the docket went missing.”

– Zandspruit resident quoted in Martin (2012) *State Crime* 223.

A final instance of ineptitude highlighted by the Khayelitsha Commission that is attributable at least partially to police lethargy is that dockets are not brought to court. This is either because the dockets themselves are missing, or simply due to police failure to get them to court on time,¹³⁹ a concern for 7% of complainants.¹⁴⁰ While this issue has already been mentioned in connection with a lack of resources, the reasons proffered by the DPP for the proliferation of missing dockets¹⁴¹ may merely be an attempt to deflect blame away from police failings. That it is within the power of the police to improve their efficiency, but that they choose not to, is borne

¹³⁸ 95-96.

¹³⁹ The Detective Commander of the Khayelitsha Site B police station, Colonel Marais, admitted that “plain negligence” often accounted for dockets not arriving at court (O’Regan & Pikoli *Khayelitsha Commission Report* 231).

¹⁴⁰ 103-104.

¹⁴¹ See chapter 4 n 123 for more details.

out by the testimony of the senior prosecutor at the Khayelitsha Magistrates' Court. She noted that sometimes there would be a temporary improvement in the delivery of dockets after the issue had (yet again) been drawn to SAPS's attention in their monthly meetings, but then things "tend to go back to the way it was before".¹⁴²

The Khayelitsha Commission found that between 16% and 36% of serious cases¹⁴³ are withdrawn or struck off the roll simply because of incomplete police investigation or the repeated failure to bring dockets to court – this only occurring after multiple postponements. Such cases are deemed ready for prosecution, with perpetrators having been identified, apprehended and having a case to answer, but convictions are not obtained due to police inefficiency.¹⁴⁴ The unavailability of dockets results in cases being withdrawn or postponed,¹⁴⁵ or suspects being released and absconding, as was the case with the accused in Ms Mpekweni's case detailed above. The finding of the Khayelitsha Commission that striking cases off the roll due to dockets not being brought to court is a "serious inefficiency" with "burdensome and serious consequences for ... the pursuit of justice" as well as for victims' confidence in police competence,¹⁴⁶ must be wholeheartedly endorsed.

Considering examples like the ones detailed above it is understandable why the state's claim to be viewed as a "credible guarantor of personal security"¹⁴⁷ might be treated with scepticism. Not only does policing inadequacy leave the direct victims of crime feeling betrayed and abandoned, but it also leaves society in general disillusioned about the state's crime-fighting capacity. Where there is an absence of visible and prompt state policing, with police neglecting to take action against wrongdoers or jeopardising their conviction by not ensuring that dockets are in court, law-enforcement (and justice!) is not palpably being seen to be done. This may

¹⁴² O'Regan & Pikoli *Khayelitsha Commission Report* 166.

¹⁴³ E.g. murder or attempted murder, rape, robbery with aggravating circumstances, kidnapping, child abuse and assault with the intent to do grievous bodily harm.

¹⁴⁴ O'Regan & Pikoli *Khayelitsha Commission Report* 162-163.

¹⁴⁵ See at 123 for an example.

¹⁴⁶ 370.

¹⁴⁷ Baker *Lawless Law Enforcers in Africa* 169.

well lead to a culture of impunity,¹⁴⁸ emboldening criminals and potential vigilantes alike to flout the law.

4 2 6 Procedural justice-related factors that contribute to state delegitimation

“[I]n our areas no-one trusts the police ... a lot of people ... get injured or ... robbed and they don’t report cases because they know the police will not take care of their cases and they will not be solved. Nothing will happen to them.”

– Khayelitsha resident quoted in O’Regan and Pikoli *Khayelitsha Commission Report* 109.

In referring to lack of trust in the police and to the notion that the police do not “take care” of the interests of those they serve, the words of this Khayelitsha community activist denote more than a dissatisfaction with the crime-fighting abilities of the police: their treatment of citizens and their *bona fides* in carrying out their duties are also questioned.

While citizens’ perception of their ineffectiveness in the fight against crime may well undermine the legitimacy of the police,¹⁴⁹ it is important to recognise that state legitimacy is eroded by factors other than weak substantive performance. As has already been mentioned, there is a substantial body of research on procedural fairness showing that people are not merely concerned with instrumental considerations: they are moral beings, concerned with procedural correctness, and the fairness and trustworthiness of legal authorities.¹⁵⁰ It is necessary, then, to consider the normative

¹⁴⁸ Hathorn, et al. “Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations Between the Community and Police in Khayelitsha: Complainant Organisations’ Heads of Argument” *Khayelitsha Commission* para 362.

¹⁴⁹ See the conclusion of Bradford, et al. (2014) *Regulation & Governance* 261.

¹⁵⁰ See, e.g., Tankebe (2009) *Law and Society Review* 247, Tyler *Why People Obey the Law*; Tyler (2003) *Crime and Justice*; Tyler & Huo *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*; and Sunshine & Tyler (2003) *Law & Society Review*.

considerations impacting state legitimacy and to recognise that the state's duty towards its citizens extends beyond simply protecting them against victimisation. What procedural fairness entails, some examples illustrating the public perception that police have violated their normative obligation to treat people in a procedurally fair manner, and the effect of such unfair treatment on citizens' propensity to support violent self-help, are now outlined.

According to Tyler's process-based model, the "key antecedents"¹⁵¹ for people being willing to internalise the obligation to obey legal authorities¹⁵² and to co-operate with them – both immediately and in the long term – are whether they perceive such authorities to be exercising their authority in fair ways, and whether they trust their motives.¹⁵³ Whether a procedure is viewed as fair depends, *inter alia* on whether decision-making is regarded as being "neutral, consistent, rule-based and without bias"; whether authorities treat people with dignity and respect, and acknowledge their rights; and whether people have an opportunity to participate in decision-making by stating their perspective and having authorities consider their views about how problems should be resolved.¹⁵⁴

As far as trust in general is concerned, there is no doubt that in South Africa there are historical reasons for levels of community mistrust of police being very high. During the apartheid era police were seen as the enemy, with people preferring to take the law into their own hands rather than work with the police. This legacy is perceived to be continuing. As one of Harris's respondents put it, "One can see from the relationship that [the police] have with the community that they haven't changed from the past police, meaning that they are not friendly enough, the communication level is not there."¹⁵⁵ It appears that the police have not managed to "win the hearts and minds" of

¹⁵¹ Tyler (2003) *Crime and Justice* 350.

¹⁵² Tyler ((2003) *Crime and Justice* 310) regards this perceived obligation to obey as "the most direct extension of the concept of legitimacy".

¹⁵³ Tyler (2003) *Crime and Justice* 294.

¹⁵⁴ 300. See also § 3 7 above.

¹⁵⁵ Harris *As for Violent Crime That's Our Daily Bread* 29.

the marginalised and disadvantaged even though, given the legacy of policing under apartheid, it may be argued that they have a special duty to do so.¹⁵⁶

In their heads of argument before the Khayelitsha Commission, the complainant organisations accused the SAPS of dehumanising, disrespectful treatment, bias, capriciousness, contempt, discourtesy and having a dismissive attitude that denied people a chance to state their point of view.¹⁵⁷ Unfortunately, there is ample corroboration for these accusations. According to the Mthente survey conducted in December 2013 and January 2014, 55.3% of survey respondents disagreed with the statement that police in Khayelitsha are polite, and post-survey focus groups characterised SAPS in Khayelitsha as “very unprofessional and disrespectful” and “apathetic”.¹⁵⁸ Many individual complainants, too, suggested that SAPS members do not treat members of the community with respect or concern.¹⁵⁹

A common grievance, accounting for 44% of complaints admitted to the record before the Khayelitsha Commission, concerned the failure of police to keep crime victims and bereaved family members abreast of the process of investigations and criminal trials.¹⁶⁰ The Commission condemned as “unacceptable” an apparent police attitude that it is unnecessary to inform bereaved family members of a criminal investigation’s progress.¹⁶¹

The Commission also denounced the police for their absence of an “ethic of courtesy and respect”, finding that minority groups such as LGBTI¹⁶² individuals and foreign nationals are the particular targets of discriminatory treatment, and are not regarded as worthy of “equal respect and concern”.¹⁶³ Overall lack of courtesy is particularly widespread among junior SAPS

¹⁵⁶ See O’Regan & Pikoli *Khayelitsha Commission Report* 275.

¹⁵⁷ Hathorn, et al. “Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations Between the Community and Police in Khayelitsha: Complainant Organisations’ Heads of Argument” *Khayelitsha Commission* para 389.

¹⁵⁸ O’Regan & Pikoli *Khayelitsha Commission Report* 133.

¹⁵⁹ 128.

¹⁶⁰ 103.

¹⁶¹ 85.

¹⁶² Lesbian, Gay, Bisexual, Transgender/Transsexual and Intersexed.

¹⁶³ O’Regan & Pikoli *Khayelitsha Commission Report* 425.

members.¹⁶⁴ Community members experience such treatment as “humiliating and an affront to their dignity”.¹⁶⁵

Another finding was that the police do not address complaints against themselves satisfactorily, with grievances not being assuaged and complaints not being dealt with equitably, speedily and in a non-biased, transparent manner. More than 80% of the complaints about Khayelitsha SAPS members made to police stations, the Provincial Inspectorate or the Independent Police Investigative Directorate (“IPID”) were deemed to be “unfounded” or “unsubstantiated”, and were dismissed. While the Commission conceded that some of the complaints could indeed have been vexatious, they held that it was unlikely that such a large proportion of them were completely groundless. They concluded that a failure to treat complaints seriously and fairly destroys confidence in the police, and is a factor contributing to the breakdown of relations between SAPS and community members.¹⁶⁶

As regards the connection between vigilantism and (a lack of) procedural justice, there is good reason to believe that a widespread perception of police untrustworthiness brought on by unfair and disrespectful treatment of citizens may indeed undermine the criminal justice system’s claim to exercise exclusive legitimate power in the crime-fighting sphere.¹⁶⁷ Research has shown that personal experiences of policing are associated with trust and legitimacy, and that unsatisfactory contact with police has a strong negative effect on trust in police fairness and effectiveness. What the police do – particularly when interacting with members of the public – determines whether they are deemed trustworthy, and thus accorded legitimacy.¹⁶⁸ Furthermore, there is empirical evidence of a link between support for vigilantism and people’s judgments about the trustworthiness of the police. Sekhonyane and Louw’s finding¹⁶⁹ that those who feel they are

¹⁶⁴ 128.

¹⁶⁵ Hathorn, et al. “Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations Between the Community and Police in Khayelitsha: Complainant Organisations’ Heads of Argument” *Khayelitsha Commission* 389.

¹⁶⁶ O’Regan & Pikoli *Khayelitsha Commission Report* 416; 419-420.

¹⁶⁷ Tankebe (2009) *Law and Society Review* 260.

¹⁶⁸ See Bradford, et al. (2014) *Regulation & Governance* and the authorities cited there.

¹⁶⁹ Sekhonyane & Louw *Violent Justice* 16.

treated unfairly and unequally by the criminal justice system are more willing to support or join violent collective action against criminals has already been noted, as has Tankebe's Ghanaian research¹⁷⁰ confirming the nexus between perceptions of police trustworthiness and public support for vigilante self-help.¹⁷¹ 31.5% of victims of crime in the Mthente survey said they do not report crimes to the police because they do not trust them – the most common reason cited for non-reporting.¹⁷² This is stark evidence that poor police treatment of community members does make citizens doubt the *bona fides* of the police to the extent that they are unwilling to entrust them with the sole responsibility to exercise force in order to ensure community safety and security. Citizens' moral identification with police institutions is undoubtedly weakened when they are treated badly,¹⁷³ and the ensuing mistrust opens up a space for them to take the law into their own hands.¹⁷⁴ Tankebe is correct in his view that violent self-help becomes in effect "an attempt to compel the police to bridge the gap between what people might consider to be their socially established entitlement to procedurally fair treatment, and the abusive and/or neglectful treatment that characterizes their encounters with the police"¹⁷⁵ – an despairing "cry for help".¹⁷⁶

4 2 7 Intentional¹⁷⁷ state shortcomings

So far only inadvertent or negligent police failings that could tend to delegitimize the formal criminal justice system and trigger vigilantism have been outlined. More extreme instances of state failure – where criminal

¹⁷⁰ Tankebe (2009) *Law and Society Review* 259-260.

¹⁷¹ See § 4 2 4 above.

¹⁷² O'Regan & Pikoli *Khayelitsha Commission Report* 131. Other reasons frequently mentioned for non-reporting were fear of being victimised by perpetrators (35.6%) and that the perpetrators are back on the street (18.4%), which likewise imply lack of trust in the police's ability to protect community members from further victimisation.

¹⁷³ Tankebe (2009) *Law and Society Review* 261.

¹⁷⁴ Harris *As for Violent Crime That's Our Daily Bread* 23.

¹⁷⁵ Tankebe (2009) *Law and Society Review* 251.

¹⁷⁶ See the title of Haffajee "Necklacing is a Cry for Help From Etwatwa" *News24*.

¹⁷⁷ "Intentional" is used here in the criminal law sense of the word explained in § 2 6 1 above: i.e., state agents' main aim and objective is to commit the wrongdoings in question (*dolus directus*), or at the very least, they foresee that in order to achieve their main aim and objective, unlawful circumstances may exist or consequences occur, and they reconcile themselves with this possibility in the sense that they carry on doing what they have chosen to do anyway (*dolus eventualis*).

justice agents are guilty not merely of undermining the realisation of justice due to negligence, but of actively and intentionally defying it – are now considered. These types of abuse of police power are particularly blameworthy, and any vigilante alternative resorted to in response to them is likely to be fuelled by an acute sense of moral “righteousness” in contrast. If police actually contribute to high crime levels instead of protecting citizens from crime, this poses a serious threat to the legitimacy of the criminal justice system. Since legal legitimacy¹⁷⁸ requires that power should not only be attained, but also exercised, in accordance with established rules, it may be argued that perceived and actual police criminality and misconduct have an impact on the state’s legal legitimacy as well as its normative legitimacy. When those in power act unlawfully when representing and enforcing the law,¹⁷⁹ it strengthens vigilantes’ claim to be the only viable alternative for fighting an incessant wave of crime that emanates both from within the police service and outside it.¹⁸⁰

4 2 7 1 Corruption

“I would prefer the police, but since they are corrupt and receive bribery, such as buying them alcohol, then the docket just disappears.”

– Zandspruit resident quoted in Martin *State Crime* 225.

A first way in which the police may be perceived as an active element in the crime “problem”, thus eroding their own legitimacy as crime-fighters, is where they are involved in corrupt activities. In South Africa corruption is criminalised in terms of the Prevention and Combating of Corrupt Activities

¹⁷⁸ As defined in § 3 4 above.

¹⁷⁹ A Nivette 2015 *Institutional Ineffectiveness, Illegitimacy, and Public Support for Vigilantism in Latin America* 10.

¹⁸⁰ Harris *As for Violent Crime That’s Our Daily Bread* 28.

Act¹⁸¹ (the “Corruption Act”). This legislation provides for a general offence of corruption¹⁸² as well as for specific crimes of corruption, including one relating to public officers (including police officers) in particular.¹⁸³ The crux of the offence is the unlawful giving or accepting of “gratification” (which may be payment or some other benefit) so as to induce the recipient to act in a certain way.¹⁸⁴ Police corruption takes many forms, including police accepting bribes for not following through a criminal violation (i.e. not making an arrest, filing a complaint or impounding property)¹⁸⁵ or when police dockets are not negligently mislaid, but deliberately “lost” or disposed of.

The perception that the police are corrupt is dismayingly widespread. While the extent of corruption is hard to estimate, Transparency International’s 2013 Global Corruption Barometer found that 83% of South African survey respondents felt that the police were corrupt, or extremely corrupt – the highest score of perceived corruption of any public agency in South Africa. 36% of respondents reported paying a bribe to the police in the 12 months prior, with 30% reporting that they had bribed a member of the judiciary.¹⁸⁶ Over half of respondents were also of the view that the level of overall corruption had increased “a lot” in the previous two years. The Mthente survey carried out in Khayelitsha found that 10% of crime victims who had not reported the offences cited police corruption as the reason for non-reporting.¹⁸⁷ The Commission tasked the Centre for Justice and Crime Prevention to carry out focus group research among young people on corruption. Many interviewees cited examples of corruption and bribery, “primarily between police and taxi drivers, and police and shebeen owners, but pervasive to the general community as well”, sufficient for the study to

¹⁸¹ Prevention and Combating of Corrupt Activities Act 12 of 2004.

¹⁸² See s 3.

¹⁸³ See s 4.

¹⁸⁴ See *S v Selebi* 2012 1 SACR 209 (SCA) para 8.

¹⁸⁵ See A Faul “Corruption and the South African Police Service: A Review and its Implications” (2007) ISS Paper 150 *Institute for Security Studies* 1 4 for more examples of corrupt practices.

¹⁸⁶ See Anonymous “Global Corruption Barometer” *Transparency International* <http://www.transparency.org/gcb2013/country/?country=south_africa> (2015-05-26). While the courts were ranked much lower at 50%, this is still a worrying percentage.

¹⁸⁷ O’Regan & Pikoli *Khayelitsha Commission Report* 430.

conclude that corruption is “a major impediment to both police efficiency and trust in the police”.¹⁸⁸

While the police tend to downplay instances of corruption in their ranks as an aberration committed by a few “bad apples”, police corruption is endemic in virtually all police agencies, and is not simply a problem of a small number of errant individuals. The power that police have to interfere with citizens’ rights, coupled with a wide discretion to do so and low levels of oversight, creates an environment conducive to police misconduct and corruption, and organisational reform is needed to address it.¹⁸⁹ Unfortunately, there appears to be a lack of political will on the part of SAPS and government as a whole in taking steps to counter police corruption.¹⁹⁰ The Commission concluded that the absence of effective systems to limit corruption within SAPS is one of the factors contributing to a breakdown in relations between the police and community members.

As far as the impact of corruption on state legitimacy is concerned, the unsurprising finding in the study of Bradford et al was that perceptions of police corruption have a “strong, negative effect on judgments about fairness and effectiveness, and, through these, legitimacy”. People who thought police took bribes were less likely to obey the police or identify with them morally¹⁹¹ – and, presumably, were more inclined towards self-help. Counterintuitively, Tankebe’s Ghanaian study found that people’s experiences of corruption was not a significant predictor of support for vigilantism, with normative rather than instrumental assessments of policing being decisive in determining vigilante support; however, those who were satisfied with police reforms in tackling corruption were less likely to condone vigilante violence.¹⁹² This suggests that where authorities are perceived to be taking police misbehaviour

¹⁸⁸ 430.

¹⁸⁹ Testimony of Mr Newham of the Institute for Security Studies (“ISS”) (292-293).

¹⁹⁰ Faul (2007) *Institute for Security Studies* 17.

¹⁹¹ Bradford, et al. (2014) *Regulation & Governance* 258.

¹⁹² Tankebe (2009) *Law and Society Review* 260.

seriously and attending to it, it is not inevitable that their normative legitimacy will be seriously undermined by corruption *per se*.¹⁹³

4 2 7 2 *Police criminality*

Various forms of police criminality, where the police either exceed their legitimate powers or act in criminal ways, will now be considered. A first type of deliberate police misconduct that could impact on the legitimacy of the criminal justice system is police brutality involving the improper use of force. Police coercion is of course legitimate under certain circumstances, and their using force in the execution of their duties – primarily when effecting an arrest – is justified in terms of the ground of justification of official capacity or public authority. This capacity to use force must be exercised in terms of the limits set down in section 49 of the Criminal Procedure Act (the “CPA”),¹⁹⁴ but police appear to flout this provision frequently.¹⁹⁵ Provision is made for the separate criminalisation of the most extreme form of police brutality – namely the torture of those in their custody – in terms of the Prevention and Combating of Torture of Persons Act¹⁹⁶ (the “Torture Act”). This legislation criminalises the intentional infliction of severe pain or suffering for purposes

¹⁹³ However, note that Bradford et al’s study found that perceptions of police effectiveness *were* a strong predictor of legitimacy in South Africa. See also § 6 2 3 for more implications for potential state re-legitimation of this chapter’s conclusions on state delegitimation.

¹⁹⁴ S 49 of the Criminal Procedure Act 51 of 1977 provides for the use of force – even deadly force – while effecting an arrest in circumstances where such forceful measures are the only way to effect the arrest, where the nature and degree of harm done is proportional to the seriousness of the suspect’s crime and the degree of danger the suspect poses to the police officer and others. In terms of s 49(2), force resulting in death may only be resorted to where the suspect’s behaviour poses a threat of serious violence to the arresting officer or others, or the police officer has a reasonable suspicion that the suspect has committed a crime involving serious bodily harm in the past (see Burchell *Principles* 142-159 and Snyman *Criminal Law* 129-134 for a complete discussion of this defence).

¹⁹⁵ A recent incident where policemen were found guilty of murder and sentenced to 15 years each for exceeding their public authority to use force to effect an arrest involved eight “rogue policemen” arresting a Mozambican taxi driver for parking on the wrong side of the road, handcuffing him to the back of a police van and dragging him hundreds of metres behind the vehicle. He was later found dead in a pool of blood in a police holding cell (Agence_France-Presse “Eight South African Policemen Guilty of Murdering Taxi Driver” (2015-08-25) *The Guardian* <<http://www.theguardian.com/world/2015/aug/25/eight-south-african-policemen-guilty-of-murdering-taxi-driver>> (2015-11-24); M Rahlaga “8 Ex-Cops Get 15 Years Each For Killing Mido Macia” (2015-11-11) *EWN* <<http://ewn.co.za/2015/11/11/Macia-trial-Eight-accused-sentenced-to-15-years>> (2015-11-24)).

¹⁹⁶ Prevention and Combating of Torture of Persons Act 13 of 2013.

such as coercing confessions¹⁹⁷ or obtaining co-operation.¹⁹⁸ The Torture Act specifies that to constitute torture, the conduct in question must be inflicted “by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity”,¹⁹⁹ which places rogue police officers firmly within its remit.

The Khayelitsha Commission heard evidence citing a study finding that 35% of South Africans admitted to being “scared of the police”²⁰⁰ – no doubt a legacy of the apartheid paramilitary policing style. Improper use of force by police was an issue for 8% of the complainants before the Khayelitsha Commission.²⁰¹ While observing that the actual or perceived improper use of force may be deeply damaging to attempts to improve SAPS’ relationship with the community, as well as being a violation of citizens’ rights, the Commission’s condemnation centres on the response of authorities to these allegations. Evidence showed that SAPS leadership did not treat such incidents “with appropriate gravity” or take steps to guard against repeat occurrences.²⁰² This approach seems to accord with Tankebe’s hypothesis that it is not simply police wrongdoing that incites vigilantism, but rather the failure of those in authority to respond appropriately when such wrongdoing occurs.

“We are the ones who don't work with the police because the police think that some of us in the township are very stupid, they are the clever ones because they go along with the criminals.”

– Interview respondent quoted in Harris *As For Violent Crime That's Our Daily Bread* 27.

Furthermore, as regards police being implicated in crime, vigilantes sometimes justify their actions by arguing that police conduct is synonymous

¹⁹⁷ S 3(a) (ii).

¹⁹⁸ S 3(a)(iii).

¹⁹⁹ S 3.

²⁰⁰ O'Regan & Pikoli *Khayelitsha Commission Report* 292.

²⁰¹ 104.

²⁰² 432.

with criminality. The police are seen to be involved in a wide range of criminal activities²⁰³ beyond simply corruption or brutality while carrying out their duties. In support of this contention, a 2013 SAPS audit revealed that 1 448 serving police officers – some of very high rank – were in fact criminals, many having been convicted of serious offences ranging from murder and attempted murder to rape, assault, theft, robbery, house-breaking, drug trafficking, domestic violence and aiding escapees. 568 had been convicted of multiple offences, and 1142 of the 1 448 were charged after enlisting in SAPS.²⁰⁴ There were a further 8 846 pending charges against police officers. While police leadership assured parliament that “unwanted elements” would be removed from police ranks, a year later all 1 448 were still on active duty.²⁰⁵

Even where police do not themselves actively commit crimes, they may abuse their power by condoning crime. Police collusion with illegal activities such as prostitution and drug-dealing enables such “businesses” to continue operating. In the same way, they may assist criminals to evade justice by deliberately “misplacing” police dockets.²⁰⁶ Worryingly, Gareth Newham of the ISS is quoted as saying that most officers involved in crime are not being held accountable, and he speculates that the numbers of police involved or implicated in crime is much higher than the SAPS audit indicates.²⁰⁷

²⁰³ Harris *As for Violent Crime That's Our Daily Bread* 28.

²⁰⁴ SAPS “Criminal Audit Analysis” (2013) .

²⁰⁵ J Rademeyer & K Wilkinson “South Africa's Criminal Cops: Is the Rot Far Worse than We Have Been Told?” (2013-08-27; updated 2014-07-23) *Africa Check* <<http://africacheck.org/reports/south-africas-criminal-cops-is-the-rot-far-worse-than-we-have-been-told/>> (2015-05-27).

²⁰⁶ These practices also amount to corruption, of course: see Faul (2007) *Institute for Security Studies* 4.

²⁰⁷ Rademeyer & Wilkinson “South Africa's Criminal Cops: Is the Rot Far Worse than We Have Been Told?” *Africa Check*.

“[The vigilantes] and the police are in cahoots. What they do there, the police are also involved.”

- Interview respondent quoted in Harris *As For Violent Crime That’s Our Daily Bread* 28.

In addition to committing or condoning “ordinary” crime, police may also be conceived of as being illegitimate in another sense: they may be involved in vigilante activities themselves, or may provide vigilantes with material or moral support.²⁰⁸

There was testimony about police complicity in vigilante activity – both active and passive – before the Khayelitsha Commission. As far as active involvement is concerned, in an affidavit before the Commission, a man reported being accused of stealing from a shebeen owner and consequently attacked by community members in an attempt to force him to return the money that he had allegedly stolen. When the police arrived, the complainant stated that rather than stopping the attack, they “also began asking where the money was and started hitting me as well”.²⁰⁹ An example of active police vigilantism from case law is *S v Sisilana and another*.²¹⁰ While sentencing two police officers for a vigilante-style murder, Ebrahim J held:

“[I]rrespective of what the deceased may have done and no matter how frustrated you were because of the failure of the police to arrest him it did not give you the right to take the law into your own hands by resorting to vigilante justice and inflicting unlawful and sustained assault on the deceased in order to exact retribution. As law enforcement officers the two of you were far more aware than others that the function of dispensing justice is vested with the courts.”²¹¹

²⁰⁸ Harris *As for Violent Crime That’s Our Daily Bread* 28.

²⁰⁹ See Hathorn, et al. “Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations Between the Community and Police in Khayelitsha: Complainant Organisations’ Heads of Argument” *Khayelitsha Commission* para 386.

²¹⁰ *S v Sisilana and another* [2009] JOL 23415 (ECB).

²¹¹ Para 8.

The failure of police to prevent acts of vigilantism seems to be even more common. The Khayelitsha Commission testimony of a witness to a violent and protracted vigilante attack, during which two police officers simply carried on having their restaurant lunch only metres away without intervening, was mentioned in § 2 4 1 2. This example of passivity could well simply amount to police lethargy, but there may be other possible motives for police to tacitly permit vigilantism to continue. Martin is of the view that the failure of police to stop vigilantes may amount to an implicit condonation of their activities.²¹² Buur²¹³ uses the term “strategic ignorance” to describe the attitude of the police to vigilantism. He opines that police do not merely turn a blind eye to acts of vigilantism; in fact, they know about and rely on vigilantes breaking the law by using corporal punishment to “discipline” people and extract information about crimes. Vigilantes’ illegal methods ensure that more criminals are apprehended, and police are happy to give vigilantes *carte blanche* to continue their “good work”, and even to offer them protection from prosecution for doing so.²¹⁴

Case law appears to confirm that there is indeed sometimes an intimate and symbiotic relationship between vigilantes and formal law enforcement. For example, *S v Hena*²¹⁵ refers to a scenario where the investigating officer in a theft case advised the complainant to approach a (vigilante) anti-crime committee to deal with her issue instead. The investigating officer testified in court that there was a close working relationship between SAPS and the anti-crime committees, and that it was police practice to involve them in the investigation of crimes. Similarly, in *Mkhize v S*²¹⁶ the appellant (the chairperson of the local CPF) testified that when they told the police who the suspects in a robbery and rape case were, the police told CPF members “to go and look for the suspects themselves” – to “get” the suspects and take them to the police station, and to ensure that there was sufficient evidence for a case to be laid. The scenario referred to by Steinberg quoted in § 4 2 2 above likewise makes it clear that there may

²¹² Martin (2012) *State Crime* 230.

²¹³ Buur “Domesticating Sovereigns” in *Domesticating Vigilantism in Africa* 34.

²¹⁴ For more on this phenomenon of unofficial state approval of vigilante conduct, see § 7 3 2 below.

²¹⁵ *S v Hena* 38D-F, also referred to above in § 4 2 3.

²¹⁶ *Mkhize v S* para 11, also referred to in § 4 2 3 above.

be instances where vigilantes are tacitly co-opted to do the police's work for them, especially in "frontier" areas, linking with the idea of "responsibilisation" or "outsourcing" of police functions discussed at § 4 2 3 above.

Police participation in vigilante-type activities, either actively or by knowingly permitting vigilantism by others, may be understood to be illegitimate in more than one sense. First, if vigilantism is conceptualised as criminal conduct, then police who engage in acts of private vigilantism, or procure others to do so on their behalf, are guilty of committing a crime.²¹⁷ Where police simply turn a blind eye to vigilantism their conduct is similarly unlawful, since they have a legal duty, by virtue of their public office and their protective relationship to the general public, to prevent harm²¹⁸ being caused to victims of vigilante violence. Whether police could be held criminally liable as perpetrators²¹⁹ merely for failing to prevent acts of vigilantism is an open question, and depends on whether the legal convictions of the community would deem this desirable, taking into consideration relevant constitutionally-protected values and rights.²²⁰ Burchell argues convincingly that criminal liability ought to be imposed in instances where police have failed to warn specific victims within a class of vulnerable victims of a risk of injury or death that is known or reasonably foreseeable.²²¹ If this approach is followed, an awareness that a vigilante attack is imminent, combined with knowledge of the identity of the prospective victim(s) of the attack, would appear to be sufficient to hold a police officer criminally liable for an omission to safeguard such vigilante victim(s). Whether it would be in accordance with public policy to deem the officer a *perpetrator* of vigilantism (or murder, assault, etc.) is debatable. It is submitted that accomplice²²² liability might be a more appropriate finding, since non-compliance with a recognised legal duty to act

²¹⁷ Where a person procures another to commit a crime, the crime is attributed to the person who uses such agent to commit the crime on their behalf, and the person is therefore classified as a perpetrator in accordance with the *qui facit per alium, facit per se* principle (Burchell *Principles* 465-466).

²¹⁸ See *Minister van Polisie v Ewels* 1975 3 SA 590 (A).

²¹⁹ A perpetrator is a participant in a crime who satisfies the requirements for liability contained in the definition of the crime in question (Snyman *Criminal Law* 252).

²²⁰ See *Carmichele v Minister of Safety and Security* para 62.

²²¹ Burchell *Principles* 85.

²²² An accomplice is a participant in a crime who furthers or assists the commission of a crime by somebody else (the perpetrator) and so does not satisfy all the requirements for liability contained in the definition of the crime in question (Snyman *Criminal Law* 266).

further the commission of the crime of the actual perpetrator of the vigilantism. Liability as an accomplice would assume that the police officer has the necessary *mens rea*, in that they knowingly further the commission of the crime and that they at least foresee the possibility of the unlawful vigilante violence resulting in harm to another²²³ (although specific knowledge of the identity of the vigilante victim(s) would probably not be a prerequisite). If a police officer acquires knowledge of a vigilantism incident after it has been committed and fails to report it with the intention of assisting the main perpetrator(s) to evade justice, this may also render the officer liable as accessory after the fact to the vigilante violence.²²⁴

Second, the fact that police are involved with vigilantes not only makes them (criminal) perpetrators of vigilante violence, with vigilantism seen as a form of crime that contributes to the criminality of the police; police involvement with vigilante groups may also be understood as a display of dereliction of duty on their part as agents of the formal criminal justice system. This perspective on the illegitimacy of police involvement in vigilantism was emphasised in *S v Hena*, where Plasket J berated police officers for allowing an anti-crime committee to assume policing functions,²²⁵ and “punished” them by excluding the evidence so obtained. He admonished the police to engage in “proper, thorough and lawful police work” instead of “sub-contracting” their investigative functions for no good reason.²²⁶ In addition to being illegitimate in the sense that police involvement in vigilantism is unlawful and criminal, the implication in *S v Hena* is that police who use vigilantes to investigate crimes do so because they are so slothful that they want to circumvent their constitutionally-imposed obligation to exercise legitimate crime-fighting force themselves, and that they deserve censure for this reason too.

²²³ See also Burchell *Principles* 496-500.

²²⁴ See *S v Pakane* 2008 1 SACR 518 (SCA) para 43-44.

²²⁵ *S v Hena* 40F. The accused abducted and assaulted a suspect, and forced him to incriminate himself.

²²⁶ 42G and 42H.

4 2 8 Concluding remarks regarding objective factors contributing to state delegitimation

There is good reason to believe that a normative legitimacy deficit, and thus also a heightened propensity to vigilantism, is closely related to the state's inability to justify its power in terms of a common framework of belief. Where the criminal justice system is for whatever reason perceived as being incapable of addressing high crime levels, this heightens feelings of physical insecurity and lack of trust in legal authorities. Minnaar views current vigilantism in South Africa as, in essence, both a "brutal indictment of the whole criminal justice system" and "an expression of its failure and the inadequacies of the policing that is or is not occurring".²²⁷ The latter aspect, namely of vigilantism as a response to "due performance" and policing inadequacies, has been addressed. The former, in terms of which vigilantism symbolises a denunciation of the wider criminal justice system, now needs further attention. As the next section makes clear, satisfactory collective security and social order assurances entail more than just an efficient criminal justice system: dissonance between state and citizen beliefs regarding the substantive content of laws or the procedural methods of law-enforcement is another major determinant of weakened normative legitimacy, and hence vigilantism.

4 3 The legitimacy implications of a "mismatch of politics"²²⁸ between state and citizen

Now that the state's unsuccessful attempts to serve the common good, and the connection between poor state performance and vigilantism, have been discussed, it is necessary to highlight the implications for vigilantism of the legitimacy requirement that power rules need to be derived from an authoritative source. It is submitted that, besides being a cry for (self-)help from citizens who feel abandoned by the formal criminal justice authorities,

²²⁷ Minnaar "The 'New' Vigilantism" in *Informal Criminal Justice* 118.

²²⁸ Barker *Legitimizing Identities* 123.

vigilantism is also the product of a legitimacy gap caused when the values underpinning the legal rules of the formal criminal justice system are in many respects incongruent with the popular beliefs purportedly sustaining them. A clash between state and citizen value systems – what Barker²²⁹ terms a “mismatch of polities” – may be as relevant for determining the likelihood of vigilante violence as an objective criminal justice system breakdown. Interestingly, Posel characterises this brand of South African vigilantism as being a result of the “burden of rights”, emerging “in the midst of a popular sense of a world going astray, and of the menace which inheres in the gift of freedom, particularly in respect of the breakdown of generational and gender-based forms of authority”.²³⁰ As already mentioned,²³¹ state remoteness from citizens goes beyond the mere spatial distance and “no-go areas” already considered: a frontier may also be “an inner one of state or ‘ruling class’ legitimacy, and the problem ... one of reaching hearts and minds rather than actual places”.²³² The divergence between state and citizen beliefs may relate either to the substantive (“first-order”) rules determining the conduct deemed worthy of punishment, or to the procedural (“second-order”) rules defining how and by whom substantive rules can be made, who may apply and enforce them, the proper circumstances and procedures for their application and enforcement,²³³ and the consequences of rule-enforcement for those subject to them.

4 3 1 Substantive (first-order) dissonance

Discrepancies between state and citizens in their perception of what constitutes a crime are crucial for understanding the emergence of vigilantism.²³⁴ In this section, the desire of marginalised communities in

²²⁹ 123.

²³⁰ D Posel “Afterword: Vigilantism and the Burden of Rights: Reflections on the Paradoxes of Freedom in Post-Apartheid South Africa” (2004) 63 (2) *African Studies* 231 233.

²³¹ See § 4 2 2 above.

²³² Abrahams *Vigilant Citizens* 169.

²³³ 155.

²³⁴ Buur (2006) *Development and Change* 755.

particular to police “alternative orders”,²³⁵ and how this tendency – as opposed to actual police failure – may lead to vigilantism, is explained and elaborated on. It has already been emphasised that the vigilante agenda is not in essence a revolutionary one; vigilantes do not generally seek to institute truly new laws and moralities.²³⁶ However, where the state is perceived to be following alien, inappropriate or erroneous²³⁷ principles in making decisions about what should be criminalised, this may lead citizens to seek to broaden the reach of existing laws to protect values that they consider to be unduly neglected.

To understand the interplay between vigilantism and substantive dissonance between state and citizens, it is important to keep in mind that the process of formal state criminalisation is essentially arbitrary; what a particular state chooses to criminalise is not absolute, but varies from time to time and place to place. The only answer to the question “What is a crime?” that is always valid is: “A crime is any conduct which is defined by law to be a crime and for which punishment is prescribed”.²³⁸ nothing at all is specified about “what the content of a law of crimes is or ought to be.”²³⁹ This insight has two main implications that are relevant for vigilantism. First, it serves as a reminder that there is not some universal scale of evil or public consensus as to what interests should take precedence when categories of crime are established. According to Greenhouse, it is “[t]he interests of authority and its need for self-legitimization [that] determine crime, ... not the nature of the acts in question”.²⁴⁰ Second, because those in power ultimately decide which forms of conduct should be labelled as criminal, there is an intimate relationship between the criminalisation process and legitimacy: for the state to be normatively legitimate, its subordinates must accept as lawful the criminalisation decisions it makes. If there are discrepancies between the law

²³⁵ Baker (2004) *Society in Transition* 213.

²³⁶ Kirsch & Grätz “Vigilantism, State Ontologies & Encompassment” in *Domesticating Vigilantism in Africa* 8.

²³⁷ Baker *Security in Post-Conflict Africa* 29.

²³⁸ J Burchell *South African Criminal Law and Procedure Volume I: General Principles of Criminal Law* (1997) 1.

²³⁹ H L Packer *The Limits of the Criminal Sanction* (1968) 18.

²⁴⁰ Quoted in S Jensen “Policing Nkomazi: Masculinity and Intergenerational Conflicts” in D Pratten and A Sen (eds) *Global Vigilantes* (2007) 56.

and people's moral values regarding whether particular conduct is deserving of punishment, "the law is less likely to be able to call upon people's moral motivations to support the legal system".²⁴¹ Combining these two insights, understanding that crime itself is not a fixed category, but is instead potentially "polyvalent", ²⁴² negotiated and contested, makes it apparent that the discourse of crime and criminalisation is one that "traverses, challenges and maintains the structures of authority".²⁴³ From the state perspective, having the final say on what conduct it deems punishable is a resource that both displays and helps to maintain its authority.

Vigilantes contest this conception of crime as being limited to the transgressions defined by the formal legal structures. Resorting to self-help may thus be an expression of disagreement, sometimes violent disagreement, with the state regarding the punishable content of substantive crimes themselves. Vigilantes may demand adherence to locally defined norms of good and bad behaviour about which the state prefers to leave individuals free to choose.²⁴⁴ Such "social control" (as opposed to "crime control") vigilantism²⁴⁵ may fulfil two distinct functions. First, it may have the objective of compelling community members to abide by the values peculiar to that community. It thus serves the purpose of consolidating the community by punishing those who display a disregard for community-specific relations and norms, even where such non-compliance is state-sanctioned, or indeed actively encouraged by the state. Second, such vigilantism may be primarily concerned with excluding the deviant Other, who is once again not a criminal in the eyes of the state. A more detailed account of vigilante rhetoric and practices aimed at violent inclusion and exclusion may be found in chapter 5.

Social control vigilantism may occur in situations of societal transition where there is a state shift towards tolerating previously frowned-upon behaviour (for instance, where "gay-bashing" occurs in reaction to the decriminalisation of homosexuality), but may also be due to specific

²⁴¹ Tyler (2006) *Journal of Social Issues* 315.

²⁴² Buur (2008) *Review of African Political Economy* 572.

²⁴³ Jensen "Policing Nkomazi" in *Global Vigilantes* 55-56.

²⁴⁴ Abrahams *Vigilant Citizens* 17.

²⁴⁵ See Johnston (1996) *British Journal of Criminology*.

community values and beliefs about what constitutes punishable conduct simply being irreconcilable with those of the state. Some examples of scenarios where vigilantes may take it upon themselves to compel compliance with distinctive political, religious, cultural or moral beliefs by punishing certain forms of non-criminal deviance are now outlined.

4 3 1 1 *Reintegration through punishment*

In many “traditional” societies there is tension between the state’s prioritisation of human rights on the one hand, and traditional socio-cultural forms of order and mechanisms of control on the other. According to Buur, many view the legal entitlements granted to women, young people and children in terms of the Constitution as a state-sanctioned condonation of misbehaviour that flouts social norms and established hierarchies.²⁴⁶ Vigilantes often serve the conservative function of attempting to reinforce a variety of traditional gender and intergenerational hierarchies in order to (re)create and unite the moral community by punishing those who fail to respect time-honoured cultural norms.

Vigilantism may occur as a result of an apparent breach of expectations regarding the respective roles of men and women in society. An example of gender-based vigilantism is the punishment of women who do not dress in an appropriately modest way. Anderson, studying vigilantism in Kenya, refers to an incident where women were stripped naked because they were “improperly” dressed in trousers.²⁴⁷ A similar occurrence took place in December 2014 in Harare, Zimbabwe, where a group of about 40 men accosted a woman in a mini-skirt and stripped her naked after accusing her of “improper dressing” at a bus terminal. It provoked outrage and two of the perpetrators were later sentenced to 12 months’ imprisonment.²⁴⁸ Harris

²⁴⁶ Buur (2008) *Review of African Political Economy*. See also Posel (2004) *African Studies* 233.

²⁴⁷ D M Anderson “Vigilantes, Violence and the Politics of Public Order in Kenya” (2002) 101 *African Affairs* 531 537.

²⁴⁸ Thompson_Reuters_Foundation “Jail for Zimbabwe Men who Publicly Stripped Woman Hoped to Deter Sex Pests: TRFN” (2015-03-28) *Todayonline* <<http://www.todayonline.com/world/jail-zimbabwe-men-who-publicly-stripped-woman-hoped-deter-sex-pests-trfn?singlepage=true>> (2015-

provides a case study of vigilantism triggered by a man not fulfilling his designated male role as provider when she describes how a young man is fined and sjambokked by a “kangaroo court” for not supporting his ex-girlfriend financially.²⁴⁹

Vigilantism may also occur as a reaction to perceived deviation from assigned roles within the family, especially concerning respect for elders. Buur describes various instances of vigilantism taking place in response to the undermining of accepted intergenerational hierarchies, including one whereby two youths were banished from the community by the *Amadlozi* vigilante group for disrespecting their father,²⁵⁰ and another where members of a (vigilante) Safety and Security structure under the CPF in Kwazakele condoned a father beating his daughter with a sjambok for disobeying him and offending the honour of his family by sleeping over at her boyfriend’s house.²⁵¹ Likewise, Oomen observes that older community members praised the vigilante group *Mapogo A Mathamaga*’s activities for representing a patriarchal vehicle for putting a protest-minded, frustrated and empowered younger generation back in their place.²⁵²

These manifestations of vigilantism are in keeping with the notion of personhood as being in essence an ongoing process, with people’s existence being dependent on their relationships with others. In contrast to the state-endorsed conception of people being autonomous individual bearers of human rights,²⁵³ individual interests are subordinate to those of the group. It is only by reincorporating those who flout community values – by violent means if necessary – that the community can remain strong and united.

06-10). For a report of a similar case in Swaziland, see IOL “Rape a Suitable Punishment for Miniskirts” (2004-09-27) *IOL News* <<http://www.iol.co.za/news/africa/rape-a-suitable-punishment-for-mini-skirts-1.222744#.VWxCX2AwyfQ>> (2015-06-01).

²⁴⁹ Harris *As for Violent Crime That’s Our Daily Bread* 23.

²⁵⁰ L Buur (2002) *WISER Symposium on Law, Crime and Moral Logics of Everyday Life* “Outsourcing the Sovereign: Local Justice and Violence in Port Elizabeth”.

²⁵¹ Buur (2008) *Review of African Political Economy* 574-576.

²⁵² Oomen (2004) *African Studies* 165.

²⁵³ L Buur “Fluctuating Personhood: Vigilantism and Citizenship in Port Elizabeth’s Townships” in D Pratten and A Sen (eds) *Global Vigilantes* (2007) 40-41. See also § 4.3.2.5 below.

4 3 1 2 *Exclusion through punishment*

The role of vigilantism as a resource “to forcefully articulate and impose a vision of community consensus”,²⁵⁴ bringing people into existence by forcing them to toe the line regarding what is culturally acceptable in gender and intergenerational terms, has been explored above.²⁵⁵ In addition to this reintegrative purpose, however, vigilantism may also be a way to “create a separation between the ‘good’ community and the evil outsiders”.²⁵⁶ As is the case when the state labels someone a criminal, vigilantes constitute the outside of their moral community²⁵⁷ by defining their own brand of deviance. Vigilantism may thus be a way of definitively demonstrating boundaries: who belongs and who does not.

A striking example of exclusionary social control vigilantism where formal avenues of redress are essentially irrelevant²⁵⁸ is where vigilantism occurs in response to witchcraft. Witches are people believed to be using evil forces to harm and kill, and are viewed by many in Africa as abhorrent outsiders, “inhuman and not fit to live”.²⁵⁹ The state, by contrast, does not even deem the right to be free from occult violence to be an interest worthy of legal protection.²⁶⁰ No effective official avenues exist to deal effectively with this “matter of the most deadly seriousness”.²⁶¹ Feeling defenceless due to the state being unwilling to protect them, witchcraft victims turn instead to vigilantism.²⁶² Brutal methods such as “necklacing” are often employed to dispose of those thought to be witches, with the flames signifying “the total

²⁵⁴ Martin (2010) *Acta Criminologica* 54.

²⁵⁵ See § 4 3 1 1.

²⁵⁶ Jensen “Policing Nkomazi” in *Global Vigilantes* 65.

²⁵⁷ 56.

²⁵⁸ Rosenbaum & Sederberg “Vigilantism: An Analysis of Establishment Violence” in *Vigilante Politics* 12-13.

²⁵⁹ Quoted in J A Cohan “The Problem of Witchcraft Violence in Africa” (2011) 44 (4) *Suffolk University Law Review* 803 840.

²⁶⁰ See § 2 5 1 1 3 above.

²⁶¹ A Ashforth *Witchcraft, Violence and Democracy in South Africa* (2005) 38; see also Nel (2014) *Acta Criminologica*.

²⁶² See Nel (2014) *Acta Criminologica*; Cohan (2011) *Suffolk University Law Review* 827; Jensen “Policing Nkomazi” in *Global Vigilantes* 55; Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 200; Ludsin (2003) *Berkeley Journal of International Law* 88; Jensen & Buur (2004) *African Studies*; N Tebbe “Witchcraft and statecraft: Liberal democracy in Africa” (2007) 96 *Georgetown Law Journal* 183; 187; 225; Baker (2004) *Journal of Contemporary African Studies* 166.

elimination of the defilement that had endangered the health, well-being and order of the community”.²⁶³

It has also been argued that xenophobic attacks are a means of “establish[ing] or reinforc[ing] barriers along the lines of ‘citizenship’” in an attempt to enforce a new order of citizenship in post-apartheid South Africa.²⁶⁴ Other perceived outsiders who may be targets of hate crime and victimisation include homosexuals²⁶⁵ and those who publicise the fact that they are HIV positive.²⁶⁶ Such conduct may appear to be an example of vigilante exclusion based on the enforcement of first-order rules that differ from those of the state – i.e., a way of imposing the belief that foreigners or homosexuals or people living with AIDS are deserving of punishment. It is submitted, however, that unlike witch-killings, violent acts resulting from xenophobia or homophobia are not truly a form of vigilantism since their victims are not victimised for perceived wrongdoing *per se* but rather primarily due to their membership of a specific group or class of persons.²⁶⁷

4 3 1 3 Conclusion regarding first-order dissonance

Although those who have been wronged view “ordinary” criminal violence and other non-criminal harms such as disrespect to elders and witchcraft as “part of the same moral universe of evil”,²⁶⁸ the state does not share this perspective. From the above, it is apparent that while the state may be willing, though unable, to guarantee citizens protection against crime, it may not only be unable, but also unwilling, to enforce social control vigilantes’ conception of the common good, since doing so may conflict with the state’s self-legitimated identity as a liberal and democratic guarantor of

²⁶³ D Chidester *Shots in the Streets: Violence and Religion in South Africa* (1992) 48-49; Nel (2014) *Acta Criminologica* 31.

²⁶⁴ Von Holdt, et al. *The Smoke That Calls* 24.

²⁶⁵ This includes incidences of “corrective rape” of lesbians. See J Nel & M Judge “Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts, Responses” (2008) 21 (3) *Acta Criminologica* 19 for more on hate crimes committed against gays and lesbians.

²⁶⁶ See the example quoted by Harris (*As for Violent Crime That’s Our Daily Bread* 41) of the health worker who was stoned to death by a mob for “degrading her neighbourhood” by disclosing her HIV-positive status.

²⁶⁷ For more on this argument, see § 2 7 above.

²⁶⁸ Jensen & Buur (2004) *African Studies* 206.

human rights and freedoms.²⁶⁹ The tension between the state's professed adherence to a human-rights-friendly paradigm in the sphere of criminal justice and the more punitive crime-fighting approach espoused by vigilantes is even more acute when it comes to the enforcement of criminal norms upon which the state and vigilantes agree. This issue is considered next.

4 3 2 Procedural (second-order) dissonance

Even where state and citizens share the common interest of repressing criminal conduct, differences of opinion about how such conduct should be dealt with may result in divergence between the state's own legitimated identity and that of its citizens. As briefly mentioned in § 3 4 above, the state seeks to justify its inherently arbitrary exercise of power by availing itself of ceremonies aimed at reinforcing respect for the law as the first duty of the subordinate. In the criminal justice sphere, the most important solemn ritual employed by the state to "retain [its] aura of legitimacy"²⁷⁰ is the formal judicial process. However, if the underlying values of the state and citizens concerning the foundations of justice and the treatment of criminal suspects diverge to such an extent that the "very rituals which satisfy and sustain the rulers incite disaffection among the ruled",²⁷¹ formal implementation of criminal prohibitions risks undermining state legitimacy rather than strengthening it.

Packer's distinction between the "crime control" and "due process" models of criminal process is an instructive starting point for understanding the discrepancy between state and vigilante criminal justice priorities. The crime control model emphasises achieving efficient protection of the community by using speedy and informal procedures to apprehend and convict the maximum number of criminals.²⁷² The due process model, in contrast, gives precedence to obtaining reliable and fair convictions and

²⁶⁹ See also Nel *Crime as Punishment* 30 and § 6 2 1 below.

²⁷⁰ Chidester *Shots in the Streets* 37.

²⁷¹ Barker *Legitimizing Identities* 127.

²⁷² Packer *Limits of the Criminal Sanction* 158-163.

upholding the rule of law, being prepared to sacrifice optimal efficiency in favour of protecting the rights of the accused against potential state abuse of power.²⁷³ Supancic and Willis²⁷⁴ argue that (crime-fighting) vigilantism is a “more pure version” of the crime control model, being compatible with an informal criminal justice agenda that prioritises the immediate and efficient elimination of those considered to be factually guilty.

The sense that vigilantes and the state have seemingly irreconcilable law-enforcement paradigms is well illustrated by *Zuko v S*.²⁷⁵ The facts of the case were as follows:²⁷⁶ The complainant, a tavern owner, was robbed at gunpoint of money and a pistol by a group of seven men. He reported the robbery to the police. The next day he saw a person he thought was one of the robbers (the appellant) in the street, and followed him to his home. He contacted the members of a vigilante group to which he belonged, consisting mainly of business-people, and a group of about 50 of them gathered that evening. The complainant had by that time compiled a list of suspects by asking patrons of his tavern if they knew of local people “wat stout is”.²⁷⁷ At 11pm the group proceeded to the shack that the complainant had seen the appellant enter. The appellant answered the door and a group of vigilantes, including the complainant, then entered and searched the shack. The complainant found his pistol in the shack. The appellant was assaulted, seemingly in order to obtain information about others who had participated in the robbery. He led the vigilantes to his co-accused, and the rifle used in the robbery was also recovered. The vigilantes handed seven suspects over to the police, three of whom had to be admitted to hospital for injuries sustained at the hands of the vigilantes. In the court a quo the defence put in issue the key evidence upon which the prosecution relied, namely the discovery of the pistol. Despite finding that this evidence had been obtained in an unconstitutional manner, the magistrate was nevertheless prepared to admit it on the basis that the vigilante search and seizure was much less serious than the later violence and force used to obtain evidence about the other accused,

²⁷³ 163-171.

²⁷⁴ Supancic & Willis (1998) *Journal of Crime and Justice* 197.

²⁷⁵ *Zuko v S*.

²⁷⁶ Paras 1-8.

²⁷⁷ Translation: “who are naughty/misbehaving”.

which he duly excluded.²⁷⁸ On appeal, Plasket J had to consider whether the appellant had received a fair trial. He held that the vigilantes' conduct "viewed holistically",²⁷⁹ was indeed very serious and had violated a number of the appellant's fundamental rights, including the infringement of his right to privacy resulting from the "unlawful and unauthorised intrusion"²⁸⁰ into his home by the vigilantes. He set aside the appellant's conviction, holding:

"It beggars belief that [the complainant] did not know that he had no right to simply enter a person's home, assault the person to overcome resistance and force the person to provide information and to then conduct a search of the person's premises. The magistrate erred in accepting, as he did, that the complainant acted in good faith. This is re-enforced by the following answer given by the complainant when it was put to him that he knew he had no right to enter a person's house without that person's consent. He said:

'Yes, that is true but in that case or in this case it is not easy for a person which has been robbed and you are able to identify a person when you arrive at that person's place you have to talk softly with that person. Because, even they, they never asked your permission to rob you when they robbed me.'"²⁸¹

The complainant's words show clearly the extent to which his conception of justice is totally at odds with that of the formal criminal justice system. While the latter prioritises due process, the former prioritises the outcome – the need to advance community security without delay – even at the expense of fair procedure. Undeniably, vigilantes frequently appear to perceive due process protections as hurdles to efficient and speedy justice, rather than necessary for guaranteeing justice. Some of the most significant

²⁷⁸ *Zuko v S* paras 9-10.

²⁷⁹ Para 25.

²⁸⁰ Para 19.

²⁸¹ Para 23.

incompatibilities between the state “due process” model and the vigilante “crime control” model are now highlighted.

4 3 2 1 *Speedy justice*

“But I will tell you, because I am young, I am in my early forties here in the township, we talk when we’re having beers, we talk about what is the quickest measure to get your things back when it is stolen ... Just give him a few knocks and get it back before you go the long route of the police and that. I am just saying these are the things we say.”

– Testimony of Khayelitsha resident Mr Tyhido from O’Regan & Pikoli *Khayelitsha Commission Report* xxxii.

The desire for punishment to be meted out swiftly is often cited as a justification for vigilantism. The idea of prompt justice is the cornerstone of what many regard as a very attractive vigilante criminal justice framework. Achieving instant vigilante retribution is in sharp contrast to the ideals of the more protracted formal justice model. Harris notes that the process of state justice is perceived as problematic because it delays punishment. She quotes a respondent as saying, “People want to see things happening very fast.”²⁸² Vigilantes themselves recognise the appeal of an immediate response. Buur quotes a (vigilante) *Amadlozi* leader as saying, “We act here and now. We do not, as the police do, drag our feet.”²⁸³ Indeed, the Khayelitsha Commission notes with dismay that serious delays in criminal investigation and in obtaining convictions are very common, which is a “matter of grave concern”.²⁸⁴ In the random sample of dockets the Commission analysed to evaluate the quality of investigations, there had been delays – frequently “inordinate” – in finalising

²⁸² Harris *As for Violent Crime That’s Our Daily Bread* 35.

²⁸³ Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 209; also Buur (2003) *Anthropology and Humanism* 37.

²⁸⁴ O’Regan & Pikoli *Khayelitsha Commission Report* 84.

92% of the cases.²⁸⁵ The community frustration engendered by such delays is widespread and understandable.

4 3 2 2 *Bail*

“Most people are not aware as to how the criminal justice system functions. If you can be arrested today and granted bail tomorrow ... people think that the policeman is responsible and certainly they will assume that [the perpetrator] will never stand trial again. And in some way they should try to avenge what he did themselves.”

– SAPS member quoted in Harris *As For Crime That's Our Daily Bread* 34.

The especially contentious issue of suspects being granted bail exacerbates unhappiness relating to the pedestrian speed of state justice. The complainant organisations before the Khayelitsha Commission identified the unreasonable granting of bail as being an issue of “critical importance” to the community.²⁸⁶ In support of this contention, they refer to the testimony of a witness to the beating to death of two rape suspects who said, “The police weren’t contacted [because] the community feels that the police do not care ... even if the criminals had been arrested they would have immediately been dropped off in the main road again or released the following day.” The women supporters of vigilantism cited in Meth’s study also advocated the punishment of suspects before reporting them to the police: “Yes, it is the best way because they [the criminals] are not jailed anymore”.²⁸⁷

According to Harris, that bail-related issues are cited as a key factor behind vigilante actions is due to a fundamental misunderstanding about the

²⁸⁵ 218.

²⁸⁶ Hathorn, et al. “Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations Between the Community and Police in Khayelitsha: Complainant Organisations’ Heads of Argument” *Khayelitsha Commission* para 359.

²⁸⁷ Meth (2010) *Planning Theory and Practice* 256.

role of due process. Rather than being a necessary due process mechanism, bail is seen as an impediment to speedy justice, serving the interests of criminals instead of those of crime victims and the wider community. It is regarded as a “space in which criminals are able to return to their communities and flaunt their ‘freedom’, as well as intimidate their victims and re-continue with criminal actions”.²⁸⁸

4 3 2 3 *The need for compensatory justice*

“[Vigilantes in Mamelodi are successful because] you find the community saying the police can't do nothing, even if maybe my property was stolen and the person was found guilty by the court, they don't get a way of compensation, they don't get back what was stolen or whatever damage was sustained. They don't get paid back so now if they take their case to the kangaroo court, judgment is passed and then people are paid back and so on.”

– SAPS member quoted in Harris *As For Crime That's Our Daily Bread* 21.

Within the context of marginalisation, socioeconomic deprivation and inequality in which most vigilantism occurs, one of the chief reasons for vigilante activities being supported by the community is that vigilantes do not just arrest and punish perpetrators of theft; unlike the police, they get the stolen goods back.²⁸⁹ This practical ability to restore material belongings makes informal justice solutions very attractive for impoverished community members, who cannot afford to pay for technology or private security to safeguard their possessions, nor for insurance if they are stolen.²⁹⁰ For state criminal justice agents, stolen items are merely evidence to be retained for

²⁸⁸ Harris *As for Violent Crime That's Our Daily Bread* 35.

²⁸⁹ See Buur (2003) *Anthropology and Humanism*.

²⁹⁰ See Baker *Lawless Law Enforcers in Africa* 160; Buur (2003) *Anthropology and Humanism* 37.

judicial proceedings to be held months – even years – hence. For the victim of theft, in contrast, a stolen item like a television set may represent the loss of a year's savings, of the only decent item the family possesses.²⁹¹ Even the Khayelitsha Commission, which made precious few vigilante-specific recommendations beyond the need to develop strategies to deal with vigilante attacks more effectively, recognised that the formal criminal justice system's non-restoration of stolen items could be a significant trigger for vigilantism. The Commission recommended that a study be requisitioned to consider whether it would be feasible to return stolen goods instantly to complainants rather than keeping them as exhibits.²⁹²

There is thus a fundamental discrepancy regarding the need to retrieve stolen possessions between vigilantes' retributive and – quite literally – restorative crime control justice framework and the rehabilitative and due process focus of the formal justice system – an “elementary distinction between the premises of each approach”²⁹³ that transcends any practical failings of the formal criminal justice system.

4 3 2 4 Procedure and punishment

“In order to get evidence ... one sometimes ha[s] to apply pressure – ‘If you need water out of a sponge, you squeeze it a little’”.

- Monthle John Magolego, leader of *Mapogo-a Mathamaga*, quoted in Comaroff & Comaroff “Popular Justice in the New South Africa” in *Legitimacy and Criminal Justice: International Perspectives* 230.

²⁹¹ Buur (2003) *Anthropology and Humanism* 36.

²⁹² O'Regan & Pikoli *Khayelitsha Commission Report* 456; see also Hathorn, et al. “Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations Between the Community and Police in Khayelitsha: Complainant Organisations' Heads of Argument” *Khayelitsha Commission* paras 373-375.

²⁹³ Harris *As for Violent Crime That's Our Daily Bread* 21.

That the fundamental criminal justice premises of vigilantes and the state may be seemingly irreconcilable is particularly pertinent where the procedure to be used to enforce first-order rules, as well as the determination of an appropriate sanction, is concerned. The question of disproportionate vigilante punishments has already been highlighted,²⁹⁴ and vigilante punishment processes and methods are further explored in chapter 5 below, where some of the parallels and discrepancies between formal and informal justice practices are outlined. At this point it is merely necessary to reiterate that vigilantes reject the “soft” and “criminal-friendly” formal criminal justice system, harking back to a system capable of administering harsh and instant “popular justice”. In so doing, they commonly draw on the discourse of an African notion of justice, using “culture” and tradition” to justify their strong leaning towards brutal methods of “fighting crime”.²⁹⁵ Popular punishments include the imposition of capital punishment and severe corporal punishment,²⁹⁶ both of which formal legal authorities reject as being cruel and inhuman punishment incompatible with the right to life and human dignity.²⁹⁷

²⁹⁴ See § 2 4 2 above.

²⁹⁵ See also Harris *As for Violent Crime That's Our Daily Bread* 37-38.

²⁹⁶ E.g., *Mapogo A Mathamaga's* public administering of *sethlare* (meaning “medicine”, and referring to the sjambok that is dipped in traditional herbs and salt – or even a secret ointment containing peri-peri sauce!) to suspects, occasionally causing death (Sekhonyane & Louw *Violent Justice*; Minnaar (2001) *Institute for Human Rights and Criminal Justice Studies* 28).

²⁹⁷ E.g., the South African Constitutional Court declared both the death penalty (*S v Makwanyane*) and corporal punishment (*S v Williams and others* 1995 3 SA 632 (CC)) to be unconstitutional.

4 3 2 5 *Understanding second-order dissonance: the role of human rights*

“In the past a person who stole a radio would be caught and beaten by people and it would end there. That person would not do it again. I don’t understand the present law that states that even criminals have rights.”

“Crime is worse because people have rights now – even criminals have rights. In fact they have more rights than the citizens who behave themselves in the community. It is so sad. You can’t tell people anything now because they will tell you about their rights.”

- Respondents interviewed for a Soweto research project (G Kynoch “Apartheid Nostalgia: Personal Security Concerns in South African Townships” (2003) 5 *South African Crime Quarterly* 7 10).

Vigilantes’ adherence to the crime control model – as evidenced by their prioritising swift, compensatory and punitive justice – may to some extent be understood as a reaction to misunderstandings about the necessity and function of procedural safeguards (such as bail and a fair trial), which are seen as advancing the interests of criminals at the expense of their victims and the community at large. Nevertheless, vigilantism may probably better be explained as a fundamental divergence from – and, indeed, a disagreement with – the human rights framework underpinning the formal criminal justice system.²⁹⁸ There is a widespread mistrust of a human rights discourse that appears to prioritise the rights and interests of suspects and known offenders over those of “honest” citizens and crime victims,²⁹⁹ and such an attitude may lead to vigilantism. Since effective law enforcement is perceived to be

²⁹⁸ Harris *As for Violent Crime That’s Our Daily Bread* 29. For more on the idea of the “burden of rights”, see Posel (2004) *African Studies* 233 discussed in § 4 3 above. See also G Kynoch “Apartheid Nostalgia: Personal Security Concerns in South African Townships” (2003) 5 *South African Crime Quarterly* 7.

²⁹⁹ Martin (2012) *State Crime* 227.

hampered by the excessive rights afforded criminals,³⁰⁰ from the vigilante perspective human rights, far from being seen as a safeguard for victims whose security is guaranteed by the state, may actually fuel criminal behaviour.³⁰¹ With many township residents viewing vigilantes as their primary bulwark against crime, vigilantism can be seen as a critical response to – and a site of struggle and negotiation over – the state’s attempts to “enshrine human rights as an all-encompassing foundational value”.³⁰²

A township resident interviewed in Martin’s study encapsulates the profound dilemma of how to reconcile human rights and criminal punishment:

“I know it [vigilantism] is illegal. It’s illegal because of our constitution, because of the rights that we have. But then he doesn’t have the right to go around abusing people.”³⁰³

Understandably, vigilantes and their supporters struggle to grasp how “the rights we have” relate to the behaviour of someone who is not respecting the rights of others. Has not such a person waived at least some of his own rights by violating those of another? It is not that such individuals do not deem human rights to be a desirable common good in a distant, abstract sort of way. However, for the everyday life of a marginalised township dweller, the legal enforcement of human rights and the hierarchical precedence afforded them has very little to offer practically when it comes to ensuring security.³⁰⁴

Two of the main reasons why the beliefs purportedly sustaining the state’s human-rights-based criminal justice paradigm do not resonate with vigilantes relate to the individualistic slant of formal legal discourse, and to the related matter of the disputed role of corporal criminal punishment:

As has already been noted, the vigilante fight to maintain societal order very often involves the repression of individual rights to due legal process as

³⁰⁰ The view of Monthle John Magolego of *Mapogo A Mathamaga*, cited in Comaroff & Comaroff “Popular Justice in the New South Africa” in *Legitimacy and Criminal Justice: International Perspectives* 230.

³⁰¹ Buur (2008) *Review of African Political Economy* 572.

³⁰² 573.

³⁰³ Township resident quoted in Martin (2012) *State Crime* 227.

³⁰⁴ Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 210.

laid down by the state.³⁰⁵ Vigilantes favour enforcing the security rights and moral interests of the whole community and society, while the state downplays such communal interests and gives precedence to protecting individual rights – including those of suspected criminals. This dichotomy is a symptom of what Pratten terms the striking juxtaposition between the South African Constitution’s “universalizing ideology of individual rights ... and alternative ontologies of relational persons that are embedded in the practice of vigilante judgments and punishments.”³⁰⁶ While the criminal justice system views each person as an autonomous individual entitled to the rights enshrined in the Constitution, many citizens understand personhood very differently: people are, as it were, brought into existence solely by their relations with others, with personhood being “essentially an ongoing social construction”.³⁰⁷ The excessive state focus on people “having rights now” obscures individuals’ crucial social dimension – a substantial incongruence between the state and its citizens that may have serious implications for the legitimacy of formal criminal justice.

The “legal notion of a ‘universal individual’”³⁰⁸ is clearly inadequate for understanding how personhood is figured in South Africa for another reason too. One of the ways of “constructing” a person, and restoring them to wholeness within the community, is by administering corporal punishment. Buur argues that in vigilante-prone societies, the state prohibition on corporal punishment is seen as contributing to the breakdown of the social fabric in the sense that it removes from traditional authority figures their main means of instilling discipline through punishment.³⁰⁹ Vigilantes’ frequent use of corporal punishment, by comparison, “resonates and merges with everyday practices and with strongly held ideas concerning the evolution of human beings, that is, beings who can distinguish between ‘right and wrong’”.³¹⁰ In essence, the vigilante paradigm regards personhood as being inextricably linked not only to an individual’s interactions and relations with others, but also to their having

³⁰⁵ For more on the specific rights at issue, see § 6.3.1.2 below.

³⁰⁶ Pratten (2008) *Africa* 12.

³⁰⁷ Buur “Fluctuating Personhood” in *Global Vigilantes* 141.

³⁰⁸ 129.

³⁰⁹ Buur (2008) *Review of African Political Economy* 577.

³¹⁰ 577.

been taught how to become a proper member of the moral community through the administration of physical punishment. Needless to say, this means of being “made a person” does not accord with the human-rights-based model of justice whereby each individual has the right to be free from all forms of violence and not to be punished in a cruel, inhuman and degrading way.³¹¹ Ironically, the same corporal punishment that the vigilante regards as vital for rendering someone human, the state condemns as inhuman.

4 3 2 6 Conclusion: second order dissonance

Having compared the criminal process model adhered to by the state with that espoused by vigilantes, there may well be some irreconcilable incompatibilities, particularly relating to the role of corporal punishment. However, since both the state and vigilantes desire to address safety and security concerns by dealing effectively and efficiently with deviance, many of the differences do not relate to the underlying criminal justice aims as such, but rather to the relative weight accorded to the rights of perceived victims of crime vis-à-vis those of perceived perpetrators. Vigilantes, who consider themselves and the wider community to be the victims, with the targets of their violence being the perpetrators, favour crime-fighting options that are swift, compensatory and aimed at addressing collective concerns. They have little or no regard for the human rights of those they subject to punishment, except insofar as suffering physical chastisement may aid in reincorporating perceived wrongdoers as proper members of the moral community.³¹² In contrast, the state is obliged to comply with the constitutional measures in place to protect the rights of those accused of committing crimes (including vigilantes, whom it labels as criminal perpetrators rather than victims).³¹³ This results in a formal criminal justice system that is arguably more fair and just, and is certainly less punitive and harsh, but that may risk alienating

³¹¹ Constitution of the Republic of South Africa, 1996 s 12(1)(c) and s 12(1)(e).

³¹² For more on the dehumanisation of vigilante victims, see § 5 3 2 2 below.

³¹³ See particularly Constitution of the Republic of South Africa, 1996 s 35, which protects the rights of arrested, detained and accused persons.

community members on account of its ponderous, over-technical processes and the perception that it prioritises the interests of individual criminals above wider community concerns. Potential strategies to better align formal and informal law-enforcement paradigms are considered further in chapters 6 and 7. Suffice it to say that the state would do well to take seriously community appeals to implement more responsive, community-orientated and restorative modes of doing justice.

4 4 Overall conclusion

Overall, what has been outlined above seems to paint a bleak picture of the formidable criminal justice legitimacy challenge facing the state. Not only is the state confronted with practical obstacles to attaining the common good (and thus normative legitimacy) that appear insurmountable, but those from whom they seek legitimation often have disparate and opposing notions about how best to achieve community order and security.

Some of the issues identified above may well fall in the category of “unsolvables”. Factors relating to structural violence such as poverty, marginalisation, and inequitably-distributed financial resources for effective crime-fighting are impediments to legitimacy that are simply beyond the state’s short-term remit. In a society with deep-rooted patterns of disadvantage and discrimination where the state lacks the funds to effect needed change, a degree of legitimacy erosion is inevitable. Other issues may be unsolvable because the state simply does not want to solve them, and probably never will. Much of the first and second-order dissonance discussed above is of this type. Criminalising the wearing of short skirts or reinstating corporal punishment is not a realistic option for a state whose self-legitimated identity is premised on the supremacy of individual human rights. This poses a dilemma for the state, since refusing to compromise its legitimating beliefs may risk alienating “law-abiding” citizens. The perception that the state is letting “criminals” get away with “crimes” and is unnecessarily safeguarding the rights of such “criminals” may contribute to the undermining of state

legitimacy and potentially increase the probability of vigilantism. While this is no doubt a conundrum, it is argued in §§ 6 4 and 7 1 below that such a “zero-sum policy game” approach,³¹⁴ which assumes that the rights of an accused can only be protected at the expense of those of victims or the community, is mistaken – at least in the context of upholding due process rights. It may yet be possible for the state to relegitimate itself without undermining human rights. In this regard, such strategies as harnessing the communal spirit of *ubuntu* in the fight against crime will be explored. The state challenge is to find a better way to balance, on the one hand, the constitutional justice dictates of narrow individual due process rights, and, on the other, the community demand that those violating societal interests be dealt with in a manner that is seen to be just in the wider sense of satisfying the societal desire for speedy retribution and restitution.

Indeed, in regard to state legitimacy erosion, the outlook may be rosier than initially assumed. A number of the potential causes of state delegitimation (and hence vigilantism) – and crucially, some of the most significant according to empirical research³¹⁵ – are within the power of the state to deal with in the short to medium term without entailing exorbitant financial outlay. Exactly how the state might attempt to do so is explored in chapter 6. Some of the possible interventions relate to community education (to address issues such as a pervasive culture of violence and a lack of respect for due process rights); improved police accountability and oversight (to increase police effectiveness and decrease police corruption and criminality); a focus on restorative rather than punitive solutions to vigilantism; and a policing model based on procedural justice (to enhance community trust in the criminal justice system). These types of strategies have the potential both to enhance state legitimacy and correspondingly decrease the likelihood of people feeling the need to take the law into their own hands.

Before proceeding to address how the state may relegitimate itself, however, it is necessary to gain a better understanding of how vigilantes

³¹⁴ Garland *Culture of Control* 11.

³¹⁵ See, e.g., § 4 2 6 above.

constitute themselves as viable alternative bearers of legitimacy in the criminal justice sphere. This question is the focus of the next chapter.

5 CHAPTER FIVE: VIGILANTE COUNTER-LEGITIMATION

5 1 Introduction

In the previous chapter it was argued that high rates of vigilantism reflect, *inter alia*, state failure to command widespread legitimacy due to the state being inefficient, corrupt and out of touch with popular concerns, a situation exacerbated in marginalised and poverty-stricken communities where violence is commonplace. The root causes of vigilantism and vigilantism's link with state delegitimation have thus been considered, and it has been established that vigilantism is at least partly a symptom of the significant erosion of state claims to legitimacy in the crime-fighting domain. Chapters 6 and 7 attempt to address state legitimacy shortcomings by identifying specific strategies that the state could consider using in order to persuade citizens that its particular brand of security provision is worthy of (re)legitimation. But in a context of "multi-choice"¹ policing, what exactly is the state up against as regards alternative service providers in the crime-fighting arena? It is submitted that only by comprehending the underlying reasons for informal justice's widespread appeal may the state find ways to counteract its manifestations – including vigilantism – effectively. Ascertaining how vigilantes constitute themselves as viable alternative bearers of legitimacy in the criminal justice sphere is thus crucial for explaining the persistence and popularity of vigilantism, as well as for devising ways to neutralise such endeavours. The state must perforce deconstruct, undermine or appropriate vigilantes' crime-fighting power if it is to portray itself as a preferred and legitimate guarantor of social order and security; hence the focus of this chapter shifts to clarifying the issue of vigilante self-legitimation.²

¹ See Baker (2004) *Society in Transition* at 204-205; also Baker *Multi-Choice Policing*.

² In discussing vigilante attempts to acquire legitimacy, the term "self-legitimation" will be used interchangeably with the term "counter-legitimation". The former highlights that being recognised

As already noted, legitimacy relates to the justified exercise of power – indeed, the legitimization of power is an “inherent and characterising activity”³ of those who lay claim to it. Vigilantes’ appropriation of state power in respect of law-enforcement requires them, like the state, to justify their use of force in order to command widespread popular support: “Just as the constitutive power of formal law depends on the ability of legal institutions to legitimate its power, so too the social utility of [vigilantism is] dependent upon its capacity to garner legitimacy”.⁴ In the interests of clarity and consistency, it has been decided to link the analysis of vigilante attempts to enhance their legitimacy to the aspects of legitimacy identified in chapter 3, namely legal legitimacy, normative legitimacy and demonstrative legitimacy. In Brown’s treatise on American frontier vigilantism, he considers what he terms the “philosophy of vigilantism” – the values based upon which vigilantes seek to legitimate their (consciously illegal) resorting to violence. He identifies three main constituent parts of the vigilante ideology, namely popular sovereignty, self-preservation and the right to revolution.⁵ Significantly, as will be elaborated on below, contemporary adherents of vigilantism espouse elements of these basic vigilante values too. It is submitted that each of these three aspects can be linked to one of Beetham’s legitimacy components. First, popular sovereignty links to legal legitimacy in that it denotes the source of the (legitimate) power in question. As will become apparent, vigilantes’ assertion that their violent acts are “legitimated by popular will”⁶ bases their legal legitimacy on the claim that they are acting democratically, with the support of “the people”. Second, as regards self-preservation, an appeal to the right to self-protection is aligned with the normative legitimacy idea that the authority exercised by the powerful is justified by their serving the common good. In this instance, vigilantes maintain that their role is to safeguard and preserve the moral community

as legitimate is an act or process that is primarily driven by those wishing to achieve such legitimization, whereas the latter emphasises that vigilante legitimization is closely bound up with – and a response to – state efforts at legitimization.

³ Barker *Legitimizing Identities* 30.

⁴ S Jean & W Brundage “Legitimizing ‘Justice’: Lynching and the Boundaries of Informal Justice in the American South” in D Feenan (eds) *Informal Criminal Justice* (2002) 172.

⁵ Brown “The American Vigilante Tradition” in *The History of Violence in America* 179-182; see also Little & Sheffield (1983) *American Sociological Review* 805.

⁶ Snodgrass Godoy (2004) *Theory and Society* 638.

from those “undesirable elements” deemed to be “subhuman”.⁷ Third, the notion of vigilantes’ appeal to the right to revolution resonates with the aspect of demonstrative legitimacy. Vigilantes’ refusal to legitimate the state by demonstrating their submission to its moral authority in the realm of criminal justice may be viewed as a form of “justified popular insurrection”,⁸ which naturally tends to delegitimize the state. The significance of the manner in which vigilantes both oppose and mimic the state’s “procedural and symbolic forms of legitimacy”⁹ while demonstrating their own counter-power in a bid to enhance their legitimacy will also be considered in this context.

Vigilante appeals for legitimation thus address multiple audiences, and convey a different message to each. A single act of vigilantism is at once an attempt to enforce respect for its power over the unruly with reference to a morally authoritative popular mandate for the use of force (legal legitimacy); it is an endeavour to justify vigilantes’ popular sovereignty to the community it serves on the basis of its being socially beneficial (normative legitimacy); and it is a type of “power play” that challenges state power by representing vigilante violence as a credible alternative source of authority (demonstrative legitimacy).

The aim of this chapter, then, is to highlight and explore the three main aspects of vigilante counter-legitimation so as to establish the foundation of their popular appeal. The first step is to show how vigilantes are empowered by the community, focusing on the basis for their popular mandate (legal legitimacy). It will be shown that vigilantes elicit community identification by depicting their distinctive brand of violence as a legitimate means of enforcing group norms that is carried out by upstanding, honourable and respectable members of the community, rather than as deviance from such norms.¹⁰ Next, it is argued that vigilantism may contribute to empowerment of the community (normative legitimacy), and it will be explained how vigilante

⁷ B Baker “When the Bakassi Boys Came: Eastern Nigeria Confronts Vigilantism” (2002) 20 (2) *Journal of Contemporary African Studies* 223 239.

⁸ Brown “The American Vigilante Tradition” in *The History of Violence in America* 181.

⁹ Buur *Outsourcing the Sovereign: Local Justice and Violence in Port Elizabeth* 750.

¹⁰ See Jean & Brundage “Legitimizing “Justice”” in *Informal Criminal Justice* for this process at work in lynchings in the American South.

strategies of violent inclusion and exclusion may indeed be instrumental in bringing communities into being.¹¹ Finally, vigilantism will be positioned in relation to state justice, with the emphasis being on how vigilantes delegitimize the state by expressing their own counter-legitimate authority (demonstrative legitimacy). Drawing parallels between the legitimization rituals performed by the formal criminal justice system and vigilantes highlights the extent to which vigilantes may lay claim to the same sphere of crime-fighting authority as the state – often in ways that are more closely aligned with community members’ needs and values.

The focus of this chapter is largely on how vigilantes justify their power to the external audiences to whom their appeals for self-legitimation are addressed. For this reason, the chapter does not incorporate a discussion of vigilantes’ “inward-turning” modes and rituals of self-legitimation;¹² this topic is included as Appendix A of the study instead. Appendix A contains a discussion of the criminological and psychological theories that could help explain how vigilantes are able to maintain that their own conduct is not a deviant aberration, but is instead completely consistent with their self-identity as morally upright, law-abiding citizens who are simply doing their duty in protecting the community from harm.

5 2 Legal counter-legitimation: “Legitimated by popular will”

The justified exercise of power requires legitimation, which implies a degree of external support as well as self-legitimation. As discussed in § 3 4, rule-derived validity (i.e. legal legitimacy) is crucial for power-holders in that it “confer[s] the rights on the powerful to require others to respect the exclusiveness which is the basis of their power.”¹³ Vigilantes’ effectiveness, it appears, is dependent on their achieving a clear mandate for their exercise of

¹¹ See S Jensen “Through the Lens of Crime: Land Claims and the Contestations of Citizenship on the Frontier of the South African State” in L Buur, et al. (eds) *The Security-Development Nexus: Expressions of Sovereignty and Securitization in Southern Africa* (2007) 211, where he characterises informal crime-fighting as a “community-producing performance”.

¹² See Barker *Legitimizing Identities*.

¹³ Beetham *Legitimation of Power* 56.

power.¹⁴ This analysis seems to imply that to have legal legitimacy, vigilante power must be acquired and exercised in accordance with the established laws of the land, making legal legitimacy an elusive – wellnigh impossible – goal for vigilantes. Vigilante power is *prima facie* not particularly susceptible to legitimation, consisting as it does of the often brutal, extra-legal punishment of social deviance. In addition, as outlined in § 2 5 2, a defining characteristic of vigilantism is that it occurs without formal state endorsement, so appeals for legal legitimation addressed to the state would in all likelihood fall on deaf ears.

However, despite not being able to garner official support from the state, it is submitted that vigilantes have achieved a considerable degree of success with the legitimacy appeals they address to the communities whose interests they purport to serve. The basis of the vigilante philosophy referred to in § 5 1 above is that the rule of the people is superior to all else – including the law itself.¹⁵ According to this paradigm, popular will may substitute for the law in justifying the exercise of power. Vigilantes' power to influence and shape the dynamics of their local neighbourhoods is derived from their claim to embody “the unrestrained will of the community”, thereby acting as “representative focal point for collective sentiment”.¹⁶ The *Amadlozi* vigilante group leadership declared:

“We are chosen by *the community*, therefore we cannot be accountable to anyone else than the community. They chose us because we work for them, and if they are not satisfied they will tell us what they do not like. There is no fuss there, no agendas, no politics. We are not like the politicians ... like the [CPF]”.¹⁷

Such vigilantes seem to claim to be exercising their power in an act of “direct” or “radical” democracy reminiscent of the 1980's People's Courts, as

¹⁴ Rosenbaum & Sederberg “Vigilantism: An Analysis of Establishment Violence” in *Vigilante Politics*.

¹⁵ Brown “The American Vigilante Tradition” in *The History of Violence in America* 182.

¹⁶ Martin (2010) *Acta Criminologica* 55, 64.

¹⁷ Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 199.

opposed to the constitutional democracy championed by the state.¹⁸ This insight makes it possible to understand the vigilante perspective that even if their activities are not formally state-sanctioned, having a direct popular mandate may in itself amount to achieving a species of legal legitimacy, since it denotes an obligation on community members to respect their power, if not necessarily its exclusiveness. Notwithstanding Buur's caveat that "most claims to having a mandate from 'a community' or working for 'the community' rest on the reified and tautological notion that the community is a stable, unproblematic entity",¹⁹ the foundation on which this kind of popular mandate rests must now be considered in more detail.

5 2 1 Achieving a mandate for violent exercise of power: ideologies of self-legitimation

For vigilante violence to be legitimated by popular mandate, it needs to be portrayed as "ethically coherent" as well as justifiable in terms of a common framework of belief.²⁰ Barker argues that "[i]dentification is the key to understanding legitimation, and legitimation is one of the principal functions of identification".²¹ This implies that securing and strengthening public approval of their actions depends on vigilantes' creating and cultivating a distinctive identity to which community members can relate. It has already been noted that vigilantes endeavour to enhance their legitimacy by assuming the moral high ground, representing their exercise of power as being a crucial, normatively justifiable and non-arbitrary "tool for the defence of civilization".²² This desire for justification is informed by vigilante's recognition that vigilante violence is more likely to be identified with, and thus deemed legitimate, if it is recognised as being normatively congruent – a product of beliefs central to the cultural ethos of the community concerned, not marginal to it.²³ Vigilantes need to employ mobilisation narratives that frame their actions as a necessary

¹⁸ 199.

¹⁹ 199.

²⁰ Barker *Legitimizing Identities*; Beetham *Legitimation of Power*.

²¹ Barker *Legitimizing Identities* 35.

²² Jean & Brundage "Legitimizing "Justice"" in *Informal Criminal Justice* 161.

²³ See Huggins *Vigilantism and the State in Modern Latin America*.

and credible response to a crisis situation, and framing them as such must “make sense”, resonating with the community by whom they wish to be legitimated.²⁴ To elicit such identification and resonance, vigilantism must be depicted as a legitimate means of enforcing group norms that is carried out by upstanding, honourable and respectable members of the community, rather than as deviance from such norms.²⁵ Consequently, vigilante ideologies “[t]ak[e] values and behavioral cues from the prevailing political culture”.²⁶ All in all, before they can wield legitimate power it is necessary for vigilantes to “invoke a set of values that may be expected to produce community support and approval”.²⁷ It follows that if a large proportion of a particular society espouses vigilantism’s professed underlying values, this will facilitate its “ideological legitimation”, thus increasing vigilantes’ potential support base.²⁸

For example, as mentioned earlier,²⁹ the mainstream social mores underlying the American South’s strong tradition of vigilantism that were used to justify its patently illegal behaviour include the doctrine of vigilance (alertness to danger), the right to self-preservation and revolution, and popular sovereignty.³⁰ Vigilante conduct was both respresented, and widely accepted, as an instance of popular insurgence that was justified in the interest of self-protection aimed at securing community safety and defending the common good in the absence of effective formal justice provision. Similarly, vigilantes’ ideological self-legitimation in contemporary South Africa draws on the discourse of popular justice, emphasising the right of the people to rule and the need to practise justice in a “traditional” and essentially “African” manner, invoking an “imagined order” of future peace and security.³¹ Some other values upon which vigilantes may rely to legitimate their actions to others, as

²⁴ Wisler & Onwudiwe (2008) *Police Quarterly* 438-439.

²⁵ See Jean & Brundage “Legitimizing “Justice”” in *Informal Criminal Justice* for this process at work in lynchings in the American South. For more on this aspect of vigilante self-legitimation in the context of the justification of punishment, see § 2 6 3 1 1 above.

²⁶ P C Sederberg & H J Rosenbaum “Vigilante Politics: Concluding Observations” in H Rosenbaum and P Sederberg (eds) *Vigilante Politics* (1976) 267.

²⁷ Garland (2005) *Law and Society Review* 808.

²⁸ Huggins *Vigilantism and the State in Modern Latin America*.

²⁹ In § 5 1 above.

³⁰ See Brown “The American Vigilante Tradition” in *The History of Violence in America* and Brown “The History of Vigilantism in America” in *Vigilante Politics*.

³¹ See Harris *As for Violent Crime That’s Our Daily Bread* and Nina (2000) *African Security Review*.

well as strategies employed by vigilantes to “demarcate the boundaries of legitimate mob violence”,³² are now investigated further.

5 2 1 1 *Legitimate v illegitimate vigilantism*

Legitimation requires vigilantes not only to emphasise the boundary between illegal criminality and legitimate vigilantism, but also to differentiate between justified vigilante exercise of power and “vigilantism” that oversteps the boundaries of what the community perceives to be vigilantes’ rightful role.³³ This is crucial, since the indiscriminate use of power, unfettered by constraints as to its exercise, undermines claims to legal legitimacy.³⁴ In a constitutional democracy, the state’s power is formally limited by its (constitutionally mandated) upholding of the rule of law. While vigilantes often disagree with the state that the rule of law should be defined in terms of conformity to the laws and judicial processes, or advocate the temporary suspension of such laws and processes, the populist mandate of vigilantes similarly recognises that legitimate power is limited power. For self-help violence to be perceived as justified, it needs to adhere to community expectations regarding the motivations for and extent of such violence, ensuring that what a particular community deems to be criminality and disorder are punished – and punished in a manner approved of by the community without needing to have recourse to the state criminal justice system.³⁵ For this reason, vigilante violence is often “‘located’ – culturally and spatially – at the center of community life and surrounded by a code of assumptions as to its legitimate form”.³⁶ Thus vigilantes tend to obey moral imperatives in administering “punishment”, with popular violence often being structured in terms of “legitimate” targets and “appropriate” sanctions.³⁷

³² Jean & Brundage “Legitimizing “Justice”” in *Informal Criminal Justice* 171.

³³ Wood (2003) *Crime, History and Societies* para 26.

³⁴ See Beetham *Legitimation of Power* 68.

³⁵ Baker *Lawless Law Enforcers in Africa* 167.

³⁶ Wood (2003) *Crime, History and Societies* para 20.

³⁷ Pratten (2008) *Africa* 10.

Various authors³⁸ have recognised that vigilante lynchings in the 19th century American South invoked a set of values that community members could be expected to support and approve of, namely that of the state-administered public execution. Adopting the familiar is an “implicit appeal for legitimacy that invite[s] collective recognition”,³⁹ and the ways in which vigilante rituals mirror those of the state are discussed further at § 5 4 1 1 below. What is important to recognise at this point, however, is that lynchings were not merely arbitrary and random acts of violence, but were in fact restrained by certain widely-held and enduring criteria concerning what constituted an acceptable lynching. Lynchings deviating from this stereotypical, recognisable form, for example where there was extreme disproportionality between the crime committed and the lynching itself, or where the vigilante violence was of an unseemly or gratuitous nature, were viewed as illegitimate and did not enjoy community support.⁴⁰

Similarly, modern-day vigilantes need to portray themselves as being accountable to their communities: Public endorsement of vigilantism depends on the community being able to identify with the motivation for punishment, the conduct deemed punishable, the process whereby punishment is imposed and the particular punishment inflicted. If there is dissonance between vigilante and community agendas, vigilantes risk their legitimacy being called into question – for instance, where the “crime-fighting” rhetoric of vigilantism merely offers a “legitimate” cover for “pure crime” committed for personal gain.⁴¹ Another threat to vigilante legitimacy is where organised vigilante groups transform over time from being the idealistic “champions of the people” to being as feared as the “criminals” they claim to be fighting – a relatively frequent occurrence. A good example is the vigilante group the Bakassi Boys, active across south-eastern Nigeria between 1999 and 2002. Despite their using brutal methods of execution, Meagher claims that the Bakassi

³⁸ See, e.g., Jean & Brundage “Legitimizing “Justice”” in *Informal Criminal Justice*; Garland (2005) *Law and Society Review*.

³⁹ Garland (2005) *Law and Society Review* 808.

⁴⁰ Jean & Brundage “Legitimizing “Justice”” in *Informal Criminal Justice*.

⁴¹ See Harris *As for Violent Crime That’s Our Daily Bread*.

Boys “rapidly built a reputation for fairness and honesty”.⁴² A large part of their popular appeal was due to their strict anti-corruption mandate (which formed a stark contrast to the actions of official justice providers), as well as their impartial commitment to public rather than particularistic interests.⁴³ Conversely, they lost public support when they demonstrated their own corruptibility; they were co-opted for political gain, acting as thugs for political patrons and abusing their status in order to extort money from the public.⁴⁴ Perhaps one could say that in the end they mirrored the Nigerian state too closely, undermining their legitimacy by becoming more like a political organisation (and hence criminal and corrupt), and less like the impartial and invincible “supernaturally powered superheroes”⁴⁵ they had initially appeared to be. The vigilante group PAGAD, most active between 1996 and 2000 in the coloured and mainly Muslim areas of the Cape Flats, is another illustration of how vigilantes’ failure to abide by their initial popular mandate can cause their downfall – in this instance, from “pure” crime-fighting to an increasing focus on militant religious fundamentalism. Initially PAGAD characterised itself a community response focused on targeting criminals, particularly drug dealers and gangsters, and received widespread support, particularly in respect of its more peaceful manifestations (for example, “ultimatum marches” undertaken to the homes of alleged drug dealers or gangsters).⁴⁶ When its members’ conduct became more radical and aggressive, and PAGAD was accused of committing drive-by shootings and petrol and pipe-bombings, its support waned. It made the shift from vigilante movement to militant Islamist terrorist group,⁴⁷ thereby alienating many of those who had previously legitimated it. As one Muslim community member lamented:

⁴² K Meagher “Hijacking Civil Society: The Inside Story of the Bakassi Boys Vigilante Group of South-Eastern Nigeria” (2007) 45 (1) *Journal of Modern African Studies* 89-99.

⁴³ 98-99. Meagher recounts how the Bakassi Boys rejected a massive bribe to set a notorious armed robber free and, after executing him, burned rather than shared out his property.

⁴⁴ See D J Smith “The Bakassi Boys: Vigilantism, Violence and Political Imagination in Nigeria” (2004) 19 (3) *Cultural Anthropology* 429 and Smith *A Culture of Corruption*.

⁴⁵ Smith (2004) *Cultural Anthropology* 438; Smith *A Culture of Corruption* 177.

⁴⁶ Monaghan (2004) *Low Intensity Conflict and Law Enforcement* 6.

⁴⁷ See also Gottschalk *Vigilantism v. the State: A Case Study of the Rise and Fall of Pagad, 1996-2000*; Bangstad (2005) *Journal of Southern African Studies*; B Dixon & L Johns *Gangs, Pagad and the State: Vigilantism and Revenge Violence in the Western Cape* (2001) and Africa, et al. *Crime and Community Action*.

“I attended PAGAD meetings at first. They stood for good things. But you cannot kill off persons that you have not spoken to. You cannot hate a man you have not met. PAGAD’s actions are contrary to Islam and reflects badly on the *oemma* [the global community of Muslims].”⁴⁸

While the excessive use of violence is frequently part of vigilantes’ legitimisation strategy, community support may switch to public opposition if vigilantes are perceived to have abused their power by resorting to unacceptably violent means to achieve their ends.⁴⁹ In order to achieve popular legitimisation, vigilantes must therefore walk the fine line between community-empowered, normatively legitimate vigilantism and abuse of power leading to delegitimation, which is no mean feat.

5 2 1 2 *The authority of the sjambok: corporal punishment and legitimacy*

“How can you know right from wrong if you have not been beaten?”

— Community member quoted in Buur *Review of African Political Economy* 208.

The desirability of resorting to physical punishment has long been a contentious issue. The official South African state discourse is resoundingly opposed to corporal punishment. The Constitutional Court declared its use as a criminal punishment to be unconstitutional as early as 1995,⁵⁰ and a year later legislation prohibiting its use in schools was promulgated.⁵¹ There have also been various moves to ban disciplinary chastisement in the home,

⁴⁸ Cited in Bangstad (2005) *Journal of Southern African Studies* 204.

⁴⁹ Kowalewski (1996) *Crime, Law and Social Change*

⁵⁰ *S v Williams*. It was found to be in contravention of the right not to be subjected to cruel, inhuman and degrading punishment, as well as the right to human dignity.

⁵¹ South African Schools Act 84 of 1996 s 10. The constitutionality and applicability of this legislation in both public and private schools was confirmed in *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC).

including a clause in the 2006 Children's Amendment Bill that would have removed the common law defence of reasonable chastisement, should a parent be charged with assaulting their child.⁵² Although this provision was not included in the final legislation, the government does not appear to have given up on doing away with state-sanctioned disciplinary chastisement. As recently as May 2014 Social Development Minister Bathabile Dlamini confirmed government's intention to ban corporal punishment "even in the home environment",⁵³ in line with South Africa's obligations in terms of the UN Convention on the Rights of the Child,⁵⁴ as well as its constitutional and legislative duties.⁵⁵ Her view was that "when those in positions of authority use [violence] ... children understand this as saying [that] violence is permissible when trying to persuade others to act in a certain way".⁵⁶

Such statements are in sharp contrast to the vigilante rhetoric, which is indeed animated by a belief in violence as an indispensable problem-solving and community-building tool. What needs to be clarified is why the communities on whom vigilantes rely for their legitimation are prepared to condone – and even encourage – their often excessive levels of physical force. Buur theorises that vigilantes' appeal to the need for corporal punishment is facilitated by a pre-existing justification and legitimation of the use of violence by the "wider sociocultural universe":⁵⁷

"[R]outine violence continues to exist as a subtext in the township because it is through violence that people are turned into human beings, and it is through the constant performance and embodiment of violence that the moral community is performed, despite the official adherence to constitutional democracy."⁵⁸

⁵² Children's Amendment Bill B19B of 2006 clause 139.

⁵³ Anonymous "Government to Ban "Violent Means" of Discipline at Home - Minister" (2014-05-30) *PAN: Children* <<http://children.pan.org.za/node/9526>> (2015-08-03).

⁵⁴ A 19.

⁵⁵ E.g. s 12 and s 28 of the Constitution of the Republic of South Africa, 1996 and s 7 of the Children's Act 38 of 2005. See also, for instance, Burchell *Principles* 193-203 and the authorities cited there.

⁵⁶ Anonymous "Government to Ban "Violent Means" of Discipline at Home - Minister" *PAN: Children*.

⁵⁷ Buur (2003) *Anthropology and Humanism* 34.

⁵⁸ Buur "The Sovereign Outsourced" in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 194.

Thus corporal punishment is given legitimacy by being a commonplace means of socialising young people into being able to distinguish between right and wrong. Vigilantes' use of violence resonates on various levels with the community's sense that using force is necessary and fitting. In addition to the idea that the "everyday practice"⁵⁹ of violence is a way of helping people to evolve into moral human beings, thus (presumably) restoring order and preventing future crime, it is also seen as legitimate in the pragmatic sense that it "produces 'the goods' economically"⁶⁰ – i.e., because a person who is beaten is more likely to reveal the location of stolen property. Harsh punishment also has a historical significance: Comaroff and Comaroff suggest that the violent methods employed by *Mapogo A Mathamaga* "also [re-enact] a visceral memory of violence past",⁶¹ which is in line with the idea raised earlier that vigilante violence is somehow the "traditional" manner of enacting justice – the "African way of stopping crime", as Monthle John Magolego, head of *Mapogo*, puts it.⁶² It must be stressed, too, that resorting to physical punishment is a potent manifestation of "expressive justice"; a means for community members to release powerful emotions, and a public opportunity for "acting out communal outrage"⁶³ that cannot be adequately approximated by the sanitised, impersonal penalties of formal justice. These justifications have broad community support and form the foundation for vigilantes' populist mandate.

It is hard to imagine reconciling the state's avowed intention to do away with physical punishment in all spheres of society with the vigilante perspective that their use of violent punishment is a community-authorised means of "making the world at once safe, morally founded and spiritually clean".⁶⁴ There is no doubt that many citizens would agree with Magolego when he opines, "We are sick to death of the soft-handed techniques of

⁵⁹ Buur (2008) *Review of African Political Economy* 577.

⁶⁰ Buur (2003) *Anthropology and Humanism* 38.

⁶¹ Comaroff & Comaroff "Popular Justice in the New South Africa" in *Legitimacy and Criminal Justice: International Perspectives* 228.

⁶² Quoted at 225.

⁶³ Garland (2005) *Law and Society Review* 820.

⁶⁴ Comaroff & Comaroff "Popular Justice in the New South Africa" in *Legitimacy and Criminal Justice: International Perspectives* 223.

democracy ... If they won't listen, their asses must burn.”⁶⁵ While it is tempting to discount the state's denunciation of violence as mere lip service being paid to human rights and democracy, its official stance reflects its express desire to situate its identity as human rights guarantor as a central component of its self-legitimation. A question to be addressed in chapter 7 is how the state can persuade citizens that its self-avowed human-rights-friendly identity is more worthy of being legitimated than is the vigilante's identity of being an authoritarian disciplinarian⁶⁶ who violently purges society of all ills.

5 2 1 3 *Fighting spiritual battles*

The fight against deviance is not waged on the corporeal plane alone. According to Chidester,⁶⁷ any power-holder – whether formal or informal – must “draw on symbolic resources of superhuman power and sacred purity if it is to retain an aura of legitimacy”. By so doing it seeks to disguise the tenuous grounds of its legitimacy, its often arbitrary choice of victims and its use of violence to quell opposition. Its aim is to be mandated as the only “holy, just and legitimate violence” that would restrain all opposing violence.⁶⁸ While these insights apply to state and vigilante alike, it is submitted that – at least overtly – vigilantes have been more successful at harnessing this spiritual dimension of crime-fighting for the purposes of self-legitimation. They do so on two levels: not only are superhuman powers often attributed to vigilantes, but they claim to do battle with metaphysical as well as physical enemies on behalf of communities under threat.

As regards the first level, the Bakassi Boys of Nigeria are a useful illustration of a vigilante group that were regarded as being somehow superhuman. Smith explains that they were legitimated not simply on the basis of their integrity and anti-corruption stance; their incorruptibility was believed to be spiritually assured, and they were viewed as “supernaturally

⁶⁵ Quoted at 225.

⁶⁶ Baker *Lawless Law Enforcers in Africa* 39.

⁶⁷ See Chidester *Shots in the Streets* 36-37.

⁶⁸ See 36-37.

powered superheroes”.⁶⁹ Much of the power of their “image as symbolically legitimate crime fighters” rested on their being portrayed as heroes who were protected from criminals’ bullets by magical charms and who were able to detect innocence or guilt by using their magical machetes.⁷⁰ The belief that these vigilantes’ ability to judge criminality accurately was supernaturally legitimated helps explain why so much confidence was placed in their ability to fight crime, as well as why there was little public concern – at least initially – about the possible loss of innocent lives. Smith also observes that the Bakassi Boys’ superhero image “enabled the Nigerian public to justify vigilante executions without empathizing with the executioner or the victim”.⁷¹ The depiction of vigilantes as “superheroes” eliminating “bad guys” served to allow ordinary citizens witnessing public executions to distance themselves mentally and morally from the spectacle of gratuitous violence as if watching it on a cinema screen, and to cheer on – legitimate – the conduct of vigilantes without experiencing emotions of personal culpability. The Bakassi Boys’ appeal for legitimacy was given collective recognition for a time, until their corrupt behaviour demonstrated that they were not in actual fact supernaturally sanctioned superheroes. Subsequently their legitimacy, with its reliance on “an idiom of accountability tied to the supernatural”, was undermined. Thus it appears that legitimation based purely on supernatural powers – particularly in circumstances where the claim of purity is defiled in practice by corrupt actions – may be fleeting and conditional, and is unlikely to form the basis for a long-standing collective mandate.

The second level on which the spiritual aspect of crime-fighting is relevant for vigilantism relates to vigilantes’ purported capacity to fight witches.⁷² This claim forms a significant basis upon which many communities legitimate vigilante actions, and demonstrates a power that police and other

⁶⁹ Smith (2004) *Cultural Anthropology* 438; Smith *A Culture of Corruption* 177.

⁷⁰ Smith (2004) *Cultural Anthropology* 440; Smith *A Culture of Corruption* 178.

⁷¹ Smith (2004) *Cultural Anthropology* 441; Smith *A Culture of Corruption* 179-180.

⁷² Anti-witchcraft violence has already been mentioned § 4 3 1 2 in the context of substantive dissonance between state and citizen law-enforcement beliefs, and was there characterised as a form of social control vigilantism. It was also discussed in §§ 2 5 1 1 1 and 2 5 1 1 3 when analysing the unlawful attack requirement for private defence, where it was noted that spiritual attacks are not classified as “real”, or the interests they infringe worthy of protection, for the purposes of reliance on private defence.

state law enforcement agents palpably lack.⁷³ As noted earlier,⁷⁴ vigilantes have to portray their violence as being in accordance with conventional community values and sources of authority so as to promote and sustain their claim to legitimacy. If community members perceive vigilante self-help to be a product of beliefs that are shared by all, they are able to identify more easily with vigilantes and may be more inclined to unite under their moral authority. In this, anti-witchcraft vigilantes appear to have had considerable success – perhaps owing to the prevalence of strongly-held witchcraft beliefs throughout Africa.⁷⁵ Faced with the threat of occult violence from those prepared to use evil forces to harm and kill, and living in a mode of anxiety, suspicion and fear as a result, it is perhaps unsurprising that witchcraft believers are prepared to legitimate the actions of those carrying out witch-killings so as to alleviate their spiritual insecurity.⁷⁶ There is ample evidence that those who support and organise violent action against witches are viewed as “perform[ing] a valuable social service, [thereby] attain[ing] political legitimacy”.⁷⁷ Vigilantes who battle the embodiments of metaphysical malevolence are accorded near-superhuman status. A journalist quoted by Crais says that those who “destroyed people accused of being witches or wizards were, and still are, seen by others in the community as ‘selfless heroes’ who are committed to freeing people from ‘supernatural evils’.”⁷⁸

As long as harmful witchcraft is practised and its practitioners feared, there will always be vigilantes prepared to take the law into their own hands to punish witches. Communities desire protection from occult violence, and the state is very unlikely to act on Cohan’s proposal that authorities conduct witchcraft trials “as a way of placating the public’s fears”⁷⁹ and preventing mob violence. Unless the causes of witchcraft believers’ predicaments, fears and

⁷³ For more on the state’s incapacity to ward off spiritual attacks, see Nel (2014) *Acta Criminologica*.

⁷⁴ At § 5 2 1.

⁷⁵ Cohan (2011) *Suffolk University Law Review* 807.

⁷⁶ See I Niehaus *Witchcraft and a Life in the New South Africa* (2013) 204; Nel (2014) *Acta Criminologica* 26.

⁷⁷ I Niehaus *Witchcraft, Power and Politics: Exploring the Occult in the South African Lowveld* (2001) 154; also A Minnaar “Legislative and Legal Challenges to Combating Witch Purging and Muti Murder in South Africa” in J Hund (eds) *Witchcraft Violence and the Law in South Africa* (2003) 37.

⁷⁸ C C Crais *The Politics of Evil: Magic, State Power and Political Imagination in South Africa* (2002) 116; also Nel (2014) *Acta Criminologica* 29.

⁷⁹ Cohan (2011) *Suffolk University Law Review* 853; 809.

anxieties are addressed, namely their lived experiences of “misery, marginalisation, illness, poverty and insecurity”,⁸⁰ it is difficult to contemplate a solution to the problem of witchcraft-related vigilantism. In the meantime, an aura of supernatural legitimation, or alternatively, being seen to offer a solution to the problem of threats of a supernatural origin, are powerful legitimation strategies for vigilantes.

5 3 Normative counter-legitimation: promoting community empowerment and cohesion

Now that some of the ideologies vigilantes rely upon to legitimate their power by popular mandate have been considered, the question remains why such substantial segments of certain communities heed the vigilante appeal for legitimation, contributing to the continued existence of vigilante groups either by participating in acts of vigilantism themselves or by passively condoning vigilante activities.⁸¹ In § 3 5 2 2 it was observed that the chief means of convincing the subordinate that a power-holder’s exercise of authority is normatively justifiable is to ensure that it satisfies the interests of the subordinate and serves to advance the common good – which for the state means (*inter alia*) safeguarding the well-being and security of all citizens. It is submitted that vigilantes’ claim to legitimacy likewise depends on their ability to justify their power as amounting to more than simply the convenient disposal of or intimidation of undesirables: vigilante violence needs to be represented as constituting empowerment *of*, and not only *by*, the community. If vigilantes can convince community members that it is socially

⁸⁰ Niehaus *Witchcraft, Power and Politics* 193.

⁸¹ See Monaghan (2004) *Low Intensity Conflict and Law Enforcement* and C Montana “Day of the Leopard” (1999) 15 *Focus* 2 for accounts of well-attended mass meetings of PAGAD and *Mapogo A Mathamaga* supporters respectively. Also, about half of a 470-strong Eastern Cape sample viewed vigilantism as acceptable, even positive, while 20% of respondents would consider participating in vigilante activity (Schönteich, et al. *Private Muscle: Outsourcing the Provision of Criminal Justice Services*). The 2003 South African Victims of Crime Survey likewise found that 7% of the 4 860 respondents were aware of a community-protection organisation operating locally that administered physical punishment to suspects (P Burton, A Du Plessis, T Leggett, A Louw, D Mistry & H Van Vuuren “National Victims of Crime Survey South Africa 2003” (2004-07-01) *ISS* <<https://www.issafrica.org/publications/monographs/monograph-101-national-victims-of-crime-survey-south-africa-2003-patrick-burton-anton-du-plessis-ted-leggett-antoINETTE-louw-du>> (2015-02-03)).

beneficial for them to come together to eliminate common enemies, not only may vigilantes' own moral authority be augmented by the community's expressed consent, but such participatory support also "has a binding effect, establishing complicity and implying group membership".⁸² Indeed, according to Pratten, vigilantism itself may amount to a "powerful and productive" means of constructing a community, its acts of violence serving to "make and mark community boundaries".⁸³ In this way, to use Jensen's terminology, practices to uncover and punish deviance are "community-producing performances"⁸⁴ – the "midwives of community".⁸⁵

Vigilantism may counteract societal fragmentation in two contrasting but complementary senses. First, it may be a unifying force, serving to strengthen and re-establish community authority by reinforcing common values and "repairing tears to the social fabric caused by disputes" – what Wood terms "violence of community";⁸⁶ and second, it may be a type of "violence of exclusion"⁸⁷ – a divisive force that promotes social solidarity through the forcible elimination of community "enemies" from the shared community space. These aspects of self-legitimizing vigilante community-building are considered separately below.

⁸² Garland (2005) *Law and Society Review* 823.

⁸³ D Pratten "Bodies of Power: Narratives of Selfhood and Security in Nigeria" in T G Kirsch and T Grätz (eds) *Domesticating Vigilantism in Africa* (2010) 119; Sen & Pratten "Perspectives on Justice and Violence" in *Global Vigilantes* 11.

⁸⁴ Jensen "Through the Lens of Crime: Land Claims and the Contestations of Citizenship on the Frontier of the South African State" in *The Security-Development Nexus: Expressions of Sovereignty and Securitization in Southern Africa* 211.

⁸⁵ 195.

⁸⁶ Wood (2003) *Crime, History and Societies* para 17.

⁸⁷ Para 17.

5 3 1 “Violence of community”: counter-legitimation through violent inclusion

“Let me give you an example of what happened in my neighbourhood just this morning at 5.00am! We heard a woman screaming “i-Bag yam? I-Bag yam? Nal’isela” (My bag! My Bag! Here’s a thief!!) In no time, I mean, in *no* time, everybody was coming out, slamming doors behind them. I mean, it was like a *split second* – and they were all dressed in their clothes, not pyjamas. It was as if they were waiting, ready all night for exactly this kind of thing to happen. Then they descended upon this man – they came with all sorts of weapons to assault him. Rocks on the street were thrown at him. In no time, the man was gone – *in no time* – they had finished him. Think about it, in a matter of a few minutes, perhaps seconds, a man is dead, killed by a group of people in my community for snatching a woman’s handbag on her way to work. Glancing at his body lying on the side of the street as I went to work, I saw that a large concrete slab – you know those slabs used to divide freeway roads. A concrete slab had been thrown on the back of his head to finish him off.”

– Extract from Dr Godobo-Madilizela’s interview with a Khayelitsha community member, quoted in O’Regan and Pikoli *Khayelitsha Commission Report* 342.

Vigilante violence may be characterised as a ritual that symbolises social cohesion, which acts as a vehicle for realising such solidarity.⁸⁸ In this regard, Durkheim argues that the purpose of punishment is not primarily to “correct the guilty person or to scare off any possible imitators”, but rather to “maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour”.⁸⁹ Durkheim’s view is that “[c]rime draws honest consciences together, concentrating them”.⁹⁰ According to this

⁸⁸ W Brundage *Lynching in the New South: Georgia and Virginia, 1880-1930* (1993).

⁸⁹ Durkheim *The Division of Labour in Society* 62-63.

⁹⁰ 58.

paradigm, punishment – which could include violent community responses to deviance – is seen as a means to reaffirm values that are perceived to be under threat, thus re-establishing or clarifying normative boundaries threatened or destabilised by social chaos.⁹¹ Snodgrass Godoy agrees that public acts of punishment are “only peripherally about the crime that precedes them; at their heart lies the goal of repairing ruptured solidarities and reinforcing bonds among the non-criminal members of the community”.⁹² Whatever one’s views regarding the harsh punishment meted out to the suspected thief in the opening quote of this section, the incident reveals that this particular neighbourhood has a very high level of solidarity and social capital.⁹³ Upon hearing a cry of distress, “everybody” was instantly prepared to accept their social responsibility to the community as a whole, spontaneously galvanising “in no time” to protect the interests of one of their number who had been victimised.⁹⁴

Similarly, Wood⁹⁵ characterises the vigilante manner of dealing with perceived deviance through self-policing as a complex mechanism aimed at maintaining community cohesion. There are two main senses in which vigilante-administered punishment may contribute to community unity. These relate to vigilantes’ ability to empower and unite communities by serving as “representative focal point for community sentiment”⁹⁶ as well as the capacity of vigilante violence to demarcate the boundary between “the community” and “outsiders”.

First, vigilantism may strengthen and reassemble community authority⁹⁷ in that vigilante acts reassert the power and values of a social order at odds with that of the state – one that relies on a reactionary and

⁹¹ See also Little & Sheffield (1983) *American Sociological Review*; Brown “The History of Vigilantism in America” in *Vigilante Politics*.

⁹² Snodgrass Godoy (2004) *Theory and Society* 636.

⁹³ According to R D Putnam *Bowling Alone: The Collapse and Revival of American Community* (2000) 19, social capital “refers to the collective value of all ‘social networks’ and the inclinations that arise from these networks to do things for each other.”

⁹⁴ See also the testimony of Brigadier Dladla, Station Commander of a Khayelitsha police station, who confirmed: “[W]e are serving the poor people who – where R20 ... means a lot, so if you take his money and he shouts a thief, people will respond just like that.” (O’Regan & Pikoli *Khayelitsha Commission Report* 227).

⁹⁵ Wood (2003) *Crime, History and Societies* para 17.

⁹⁶ Martin (2010) *Acta Criminologica* 64.

⁹⁷ Wood (2003) *Crime, History and Societies* para 18.

punitive vision of community consensus.⁹⁸ Vigilante violence, then, is a means of producing a type of localised sovereignty that “constitute[s] the formation of the moral community”.⁹⁹ In purporting to represent “latent, unacknowledged and non-legitimated strains of public sentiment”, vigilante violence celebrates a particular communal identity,¹⁰⁰ which functions to produce social solidarity. The “binding effect” of participating – even vicariously – in an act of vigilante violence not only implies group membership, but also encourages complicity.¹⁰¹ Of course, from the state’s perspective vigilante complicity may not imply a concentration of non-criminal “*honest consciences*”¹⁰² *per se*: solidarity may instead be a potential factor precipitating the conspiracy of silence that often surrounds acts of vigilantism.¹⁰³

A second function of extra-legal punishment related to community cohesion is its capacity to “redefine the identity, conscience or boundary for the threatened collective”.¹⁰⁴ It was noted earlier that community members must be able to identify with vigilantes in order to legitimate them. Barker observes that enemies are “necessary to identification, since by saying who is not, an individual, community or group marks out its boundaries more clearly”.¹⁰⁵ The “inside threshold of society”¹⁰⁶ is thus constituted with reference to the distinction between good and evil. As will be examined further when “violence of exclusion” is discussed below,¹⁰⁷ vigilante acts of “everyday violence” serve to delineate group membership by demarcating the margins between behaviour that is viewed as acceptable according to societal norms and that “which is de-legitimised, immoral, or even, quite literally in cases of suspected witchcraft, demonized”.¹⁰⁸ Vigilantes exploit the notion of

⁹⁸ Garland (2005) *Law and Society Review* 819; Martin (2010) *Acta Criminologica* 54.

⁹⁹ Buur & Jensen (2004) *African Studies* 146.

¹⁰⁰ Garland (2005) *Law and Society Review* 819.

¹⁰¹ 823.

¹⁰² To use the terminology of Durkheim *The Division of Labour in Society* 58.

¹⁰³ See § 5 4 1 1 below for a discussion of the vigilante conspiracy of silence in respect of the aspect of fear.

¹⁰⁴ Supancic & Willis (1998) *Journal of Crime and Justice* 199.

¹⁰⁵ Barker *Legitimizing Identities* 36. See from § 5 3 below for more on enhancing legitimacy through inclusion and exclusion.

¹⁰⁶ Buur (2006) *Development and Change* 753.

¹⁰⁷ From § 5 3 2.

¹⁰⁸ Martin (2010) *Acta Criminologica* 54.

enhancing identification through boundary-making (inclusion and exclusion), distancing themselves from criminal violence through an ingenious shifting of blame away from themselves towards their victims.¹⁰⁹ Labelling their victims as “criminals” deserving of “punishment” promotes community cohesion by reinforcing vigilantes’ own identity (and that of the communities whose interests they claim to protect) as innocent, long-suffering “victims”. Justifying their resort to brutal acts of violence by focusing on the need to protect the victimised community from harm enables vigilantes to enhance their normative legitimacy, since their conduct serves to advance an important societal interest.

The vigilante violence demarcating the border between the moral community and outsiders is not simply aimed at excluding the deviant enemy, however: Its objective may also be to draw errant individuals back into the community. Buur notes that, particularly where young women or girls are concerned, the primary purpose is often reintegration: physical discipline teaches community members “the right way” so that they may be fully restored as members of the moral community.¹¹⁰

¹⁰⁹ See Knox & Monaghan *Informal Justice in Divided Societies* 56-67 and Appendix A (particularly at A.iv) below on internally-directed self-legitimation strategies.

¹¹⁰ Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 205-207. See also the discussion of the role of corporal punishment at §§ 4 3 2 4 and 5 2 1 2 above. In contrast, see in the context of pre-1994 vigilantism Abel *Politics by Other Means: Law in the Struggle Against Apartheid* 322-323 who cites a *Business Day* report detailing the potentially restorative and reintegrative functioning of a People’s Court that explicitly eschews violent punishment, declaring that “the court’s intention is to educate, not punish”. Appearing before the Alexandra Action Committee (“AAC”), the complainant had accused a young man of theft and demanded that he be sjambokked. After hearing evidence, the judge found that the accused’s issues stemmed from alcohol abuse, and persuaded his “nephews” to let him live with them after agreeing that the AAC, the nephews and the complainant would monitor his drinking and spending. The judge concluded: “We do not believe that the accused is beyond redemption. He can be rehabilitated ... Sjambokking a man does not necessarily mean he will change ... We will work hard to make the accused a good person and we will also ask you to help us change this man. What do you say? Can you help us?”

5 3 2 “Violence of exclusion”: counter-legitimation through violent elimination

“[F]or the low, brutal, cruel, lazy, ignorant, insolent, sensual and blasphemous miscreants that infest the frontier we entertain but one sentiment – aversion – deep, strong and unchangeable”.

– 19th century American vigilante Thomas Dinsdale quoted in Brown *The History of Vigilantism in America* 91.

Now that the power of vigilante violence to generate and perpetuate community cohesion has been reflected on, it is necessary to elaborate on its unavoidable counterpart; the exclusion of those who do not form part of the cohesive community. As already mentioned, the identification process essential for legitimation necessarily also entails defining group membership in terms of those who are excluded as “the repulsive other”.¹¹¹ By symbolically creating enemies, vigilantes reinforce the normative boundaries between “us” and “them”. Garland terms this tendency to employ punishment primarily to exclude, “the criminology of the other”,¹¹² with the “other” being the epitome of all that is evil and undesirable – a deserving target for violent retribution who is by definition “intrinsically different from the rest of us”, an “opaquely monstrous [creature] beyond or beneath our knowing”.¹¹³

5 3 2 1 Targeting the scapegoat¹¹⁴

A useful starting-point for understanding this “violence of exclusion” is Girard’s “scapegoat mechanism”. It will become apparent that the “scapegoat” interpretation of vigilante violence as a “sacrificial act [that]

¹¹¹ Thurston *Witch, Wicce, Mother Goose* 34.

¹¹² Garland *Culture of Control* 184.

¹¹³ 184.

¹¹⁴ See Leviticus 16: 7-10 for the original biblical reference to a scapegoat (Anonymous *Life Application Bible: King James Version* (1986) 206.

appears as both sinful and saintly, an illegal as well as a legitimate exercise of violence”¹¹⁵ provides valuable insight into the ritualistic and paradoxical nature of vigilantism. It explains collective violence as a way for social groups to “deflect the potential, uncontrolled violence of the society itself”¹¹⁶ by focusing all their wrath on an arbitrary sacrificial victim – a surrogate target for all active or endemic community dissensions, rivalries, jealousies and quarrels.¹¹⁷ Self-purification and a new moral community may only be achieved through an act of expulsion whereby all dissonances are overcome by directing internal aggression against “a common enemy in which all evil, detestable forces [are] personified”.¹¹⁸ In Girard’s terms, the selection of a surrogate victim (the scapegoat) represents the “violent unanimity of a community that focuses, deflects, and thereby restrains its own potentially self-destructive violence”: the internal “bad” violence is channelled into “good” violence that violently expels or eliminates its sacrificial victims with the aim of restoring harmony to the community.¹¹⁹

The characterisation of the vigilante victim as *surrogate* – proxy – target may seem at first to contradict the reality that victims of vigilantism are attacked because they are perceived to be wrongdoers, not innocent unfortunates. However, it must be kept in mind that an act of vigilantism is a response to much more than simply the single criminal incident against which the immediate violence is directed. The reason vigilantes lash out violently has to do with multiple factors other than merely their grievance with an individual miscreant: as has been discussed, marginalisation, abandonment, fear, high overall levels of violence, disillusionment with formal channels of redress, anxiety and frustration contribute towards escalating tensions, with the final act of vigilantism being a symptom of a far greater lack of social order and security. According to Girard, “only violence can put an end to violence,

¹¹⁵ R Girard *Violence and the Sacred* (2005) 21.

¹¹⁶ 8; Chidester *Shots in the Streets* 27.

¹¹⁷ According to Girard, “[a] single victim can be substituted for all the potential victims, for all the enemy brothers that each member is striving to banish from the community. Each member’s hostility, caused by clashing against others, becomes converted from an individual feeling to a communal force unanimously directed against a single individual.” (Girard *Violence and the Sacred* 83).

¹¹⁸ J Harnischfeger “Witchcraft and the State in South Africa” in J Hund (eds) *Witchcraft Violence and the Law in South Africa* (2003) 55. See also Nel (2014) *Acta Criminologica* 30-31.

¹¹⁹ Chidester *Shots in the Streets* 34-35; Girard *Violence and the Sacred* 8; 83-84; 281.

and that is why violence is self-propagating”.¹²⁰ Where the legitimacy and power of the formal judicial system are such that it is able to maintain the exclusive, legitimate exercise of violence in a society, the state may function effectively to “deflect the menace of [private] vengeance”.¹²¹ In the absence of a legitimate judicial system to contain and restrain violence, however, Girard argues that the social order breaks under a “sacrificial crisis” and begins to identify and eradicate surrogate victims in an attempt to renegotiate the order of its world.¹²² Where there is a unanimous conviction that the surrogate is a single “polluted” enemy who is responsible for the “violent mimesis” besetting the community, destroying such surrogate victim has the effect of freeing the community from the vicious circle of vengeance and reprisals.¹²³ By selecting, eliminating and desecrating a single surrogate victim, says Girard, a community briefly defends itself against the imitative and self-propagating violence that threatens to destroy it.¹²⁴ The function of the sacrifice is to quell violence within the community and prevent conflicts from erupting, thus reinforcing the social fabric.¹²⁵ This explanation resonates in the vigilante context: Vigilante violence may indeed be conceived of as an act of “violent unanimity”¹²⁶ whereby the social solidarity and internal coherence of the community are enhanced by the elimination of relatively arbitrarily-designated targets.

While any person could potentially be targeted, the ideal scapegoat is someone on the fringes of society,¹²⁷ a marginal, liminal or borderline person who is identified as being “neither too familiar to the community nor too foreign to it”.¹²⁸ The surrogate (vigilante) victim thus stands on the symbolic

¹²⁰ Girard *Violence and the Sacred* 27.

¹²¹ 16.

¹²² See 19; 41-70; Chidester *Shots in the Streets* 32-37.

¹²³ This is because violence against the surrogate victim does not provoke a reprisal (see Girard *Violence and the Sacred* 86; 90). This corresponds with G Agamben *Homo Sacer: Sovereign Power and Bare Life* (1998) 82, where he describes his equivalent of the surrogate victim, *homo sacer*, as being continually exposed to “unsanctionable killing that ... is classifiable neither as sacrifice nor as homicide”.

¹²⁴ Girard *Violence and the Sacred* 86; Chidester *Shots in the Streets* 32-33.

¹²⁵ Girard *Violence and the Sacred* 14; 8.

¹²⁶ 84.

¹²⁷ 12.

¹²⁸ 286.

boundary dividing the inside from the outside of the community.¹²⁹ Buur describes those whom vigilantes target for punishment as “constitutive outsider[s]”,¹³⁰ embodying both what needs to be excluded as well as (by contrast) that which is included – a state Agamben terms “inclusive exclusion”.¹³¹ De Souza Martins suggests that there are “fixed cultural images about the kinds of crime and the categories of people susceptible to lynchings”.¹³² Although it is difficult to generalise about the types of offences that tend to incite vigilantism, since they range from non-criminal antisocial behaviour to heinous murder or child-rape, crimes that invite strong identification with, and sympathy for, a vulnerable victim may be particularly likely to provoke a vigilante response.¹³³ The categories of individuals especially at risk of suffering vigilante punishment may likewise depend on the specific societal context and the type of deviance at issue. As regards victims who are targeted due to their apparent criminality, such “generic criminals”¹³⁴ are usually young men. Jensen describes the beating of young men in front of the whole community as a “ritualised enactment of generational hierarchies” functioning as a means of reaffirming a particular social order – one which views the youth with considerable suspicion.¹³⁵ Buur observes that having been branded as a criminal in a specific case, such young men are excluded from civil society. Once they have been marginalised as an underclass “it becomes possible and acceptable to treat the person as a ‘bare-being’ – that is, a being that one can treat as one wishes, with impunity and without regard for their psychological and physical well-being”.¹³⁶

¹²⁹ At 307 Girard describes the qualities of a “good” sacrificial victim thus: “If [he] is to polarize and purge the emotions of the community, he must at once resemble the members of the community and differ from them; he must be at once insider and outsider, both ‘double’ and incarnation of the ‘sacred difference.’ He must be neither wholly good nor wholly bad.”

¹³⁰ Buur (2006) *Development and Change* 753.

¹³¹ Agamben *Homo Sacer* 8.

¹³² J De Souza Martins “Lynchings – Life by a Thread: Street Justice in Brazil, 1979-1988” in M K Huggins (eds) *Vigilantism and the State in Modern Latin America* (1991) 29.

¹³³ R Shotland & L Goodstein “The Role of Bystanders in Crime Control” (1984) 40 *Journal of Social Issues* 9 argue that crimes evoking strong empathy with the victim may increase the feeling of moral obligation to engage in spontaneous vigilantism because community members are left with a strong sense of their own vulnerability.

¹³⁴ Buur (2003) *Anthropology and Humanism* 34.

¹³⁵ Jensen “Through the Lens of Crime: Land Claims and the Contestations of Citizenship on the Frontier of the South African State” in *The Security-Development Nexus: Expressions of Sovereignty and Securitization in Southern Africa* 207.

¹³⁶ Buur (2003) *Anthropology and Humanism* 35.

Comaroff and Comaroff also note that young men are most susceptible to being criminalised: “They become the nightmare anticitizens who must be disciplined if order is to be restored”.¹³⁷ Clearly, branding their targets “bare-beings” or as “anticitizens” would help legitimise vigilantes’ use of force against them.

The targets of anti-witchcraft vigilantism, by contrast, are generally not young men. Petrus’ study of witchcraft-related violence in the Eastern Cape¹³⁸ found that “cultural profiling” is often the basis for distinguishing between perpetrator and victim, with the targets of witch-purging in South Africa mostly being elderly women, whereas witch-hunters are young males. Antisocial, over-individualistic, morose or “difficult” people may also be accused due to their perceived undermining of community cohesion.¹³⁹ Minnaar¹⁴⁰ notes that witchcraft accusations are often motivated by jealousy, targeting opponents or rivals whose supposed reliance on the occult has given them an unfair advantage. In this vein, Jensen explains that witchcraft accusations against the rural elite may function as a way in which young “comrades” (usually the targets of intergenerational vigilante violence) can contest the “rule of gerontocracy” and their socioeconomic marginalisation by asserting a parallel or even opposing moral community; that their (elderly) victims are witches who are getting richer by exploiting the poor.¹⁴¹ He mentions the instance of a well-connected sugar cane farmer who was accused of killing community members to turn them into zombies who would work his fields without being paid.¹⁴²

¹³⁷ Comaroff & Comaroff “Popular Justice in the New South Africa” in *Legitimacy and Criminal Justice: International Perspectives* 233. See also De Souza Martins “Lynchings – Life by a Thread” in *Vigilantism and the State in Modern Latin America* 29, who observes that stereotypical victims of vigilantism in Brazil are “idle youth” with “criminal characteristics”.

¹³⁸ T Petrus “Critical Issues Regarding the Victims of Witchcraft-Related Crime in South Africa” (2012) 24 (1) *Acta Criminologica* 29 33-34.

¹³⁹ Ludsin (2003) *Berkeley Journal of International Law* 80-81. See also Nel (2014) *Acta Criminologica* 31.

¹⁴⁰ Minnaar “Legislative and Legal Challenges to Combating Witch Purging and Muti Murder” in *Witchcraft Violence and the Law in South Africa* 73.

¹⁴¹ Jensen “Through the Lens of Crime: Land Claims and the Contestations of Citizenship on the Frontier of the South African State” in *The Security-Development Nexus: Expressions of Sovereignty and Securitization in Southern Africa* 211.

¹⁴² 210.

An example cited in an interview by Harris is a final instructive illustration of vigilante scapegoating:

“[At around 4pm] I heard this loud noise, [two men] were breaking the window [of my house] ... I took my firearm ... and tried to shoot one [but I missed him] and he ran away. [I ran after the other guy and] I managed to grab him. He was very tall and he was tough [and he was a *makwerekwere*, or foreigner. Some of the neighbours came out and we dragged him to my house]. Then we assaulted him. We assaulted him very, very, very badly so to say. [I felt so angry because this was the third attempted break-in at my house and the police had not done anything about it]. So we assaulted this guy until 8am There was this crowbar that [we] used. We beat him on the toes with that, we beat him on the head with that. And then ... we removed all his clothes, then we painted him and we let him stand on top of the electric box so that people could see him ... see that he is a criminal.”¹⁴³

This victim has many of the characteristics of the quintessential scapegoat: he is peripheral to the community in that he is a foreigner, but one can infer that he is a local resident in that he is familiar with the environment, so he is simultaneously insider and outsider. He is a tough young man – the epitome of Buur’s generic criminal. His treatment at the hands of the vigilantes is grossly disproportionate to his suspected crime, and in this respect he is an undeserving surrogate victim of such a harsh assault. The interviewee explicitly makes a connection between his anger and frustration about previous incidences of crime that were met with police apathy and the present victim’s severe punishment, revealing that inflicting vigilante punishment provides a collective purpose and cathartic release for participants that may be unrelated to the specific criminal incident. Garland notes that the “penal excess” of public lynchings (and, it is submitted, other forms of violent vigilantism) is “designed to degrade [the victim], to strip him of

¹⁴³ Harris *As for Violent Crime That’s Our Daily Bread* 24.

human dignity, and to restore him to his place as inferior”.¹⁴⁴ It would be hard to conceive of a more tormenting, dehumanising or emasculating “inclusive exclusion”¹⁴⁵ and public “ritual humiliation”¹⁴⁶ than being severely assaulted, stripped naked, painted and put on display. He is isolated, but fully in the public eye, serving as a graphic reminder of the external limits of society to those within the community who witness his degradation.

Thus the conception of the vigilante victim as scapegoat makes it possible to understand many aspects of vigilantism better, including the reasons underlying its frequently excessive violence and the choice of victim, as well as vigilantism’s societal function.

5 3 2 2 “*Linguistic black magic*”

Vigilantes’ power of symbolic exclusion and elimination may operate on a figurative level, with vigilantes waging a “war of words” against those they define as enemies. The rhetoric of vigilante violence employs such techniques as inverting the categories of “victim” and “perpetrator”¹⁴⁷ and characterising what vigilantes do as “punishment”, thereby implying that victims deserve the “just retribution” being meted out.¹⁴⁸ In addition, to obtain community sanction for their harsh and sometimes lethal actions, vigilantes tend to portray their victims not as fellow human beings, but as a subhuman, non-human or bestial underclass¹⁴⁹ – those who are “inhuman and not fit to live”.¹⁵⁰ Ascribing evil to others through the use of powerful stigmatising

¹⁴⁴ Garland (2005) *Law and Society Review* 820.

¹⁴⁵ Agamben *Homo Sacer* 8.

¹⁴⁶ Garland (2005) *Law and Society Review* 820.

¹⁴⁷ See Annexure A.iv below for how vigilantes may “neutralise” their deviance by denying the victim. See Black “Crime as Social Control” in *Towards a General Theory of Social Control Volume 2: Selected Problems* 12-13 for more on the tendency of those engaged in violent social control to reverse the role of victim and offender; also Petrus (2012) *Acta Criminologica* for a problematisation of who are actually the victims in witchcraft-related crime. Vigilantes’ dual role as perpetrator and victim is also noted in § 4 3 2 6 above.

¹⁴⁸ Abrahams “What’s in a name?” in *Informal Criminal Justice*.

¹⁴⁹ See Buur *Outsourcing the Sovereign: Local Justice and Violence in Port Elizabeth* 23; also Baker *Lawless Law Enforcers in Africa* 145; Baker (2002) *Journal of Contemporary African Studies* 239; De Souza Martins “Lynchings – Life by a Thread” in *Vigilantism and the State in Modern Latin America*.

¹⁵⁰ The description of a witch quoted in Cohan (2011) *Suffolk University Law Review* 840.

labels is a means of transforming them “into legitimate victims of [vigilantes’] own inhuman behaviour.”¹⁵¹

Using this “linguistic black magic”¹⁵² has troubling practical implications, the most disquieting of which is that “dehumanising criminals and emphasising their inhumanity underscores their lack of rights”.¹⁵³ The targets of vigilante violence are the position of Agamben’s *homo sacer*:

“[Their] entire existence is reduced to a bare life stripped of every right by virtue of the fact that anyone can kill [them] without committing homicide; [they] can save [themselves] only in perpetual flight or a foreign land. And yet [they are] in a continuous relationship with the power that banished [them] precisely insofar as [they are] at every instant exposed to an unconditioned threat of death.”¹⁵⁴

Vigilantes negate their victims’ humanity, judging them unworthy to exercise the right to access to state-imposed adjudication and punishment¹⁵⁵ (with its concomitant procedural safeguards), and appropriate to themselves the right to punish them with impunity. Due to vigilante victims’ perceived subhuman inability to “control [their] desires, hatreds and ambitions”¹⁵⁶ their status is adjudged to be akin to that of mere animals,¹⁵⁷ who are denied or have forfeited the rights and protections afforded citizens in the Constitution.¹⁵⁸ The sovereign power sanctioned to deal with their wrongdoing is thus not the constitutionally-circumscribed authority of the state, but the unlimited power of informal agents of justice such as

¹⁵¹ Abrahams “What’s in a name?” in *Informal Criminal Justice* 34.

¹⁵² 33.

¹⁵³ Meth (2010) *Planning Theory and Practice* 258.

¹⁵⁴ Agamben *Homo Sacer* 183. See also Girard *Violence and the Sacred* 13, where he says the sacrificeable are distinguished from the non-sacrificeable on the basis that they “can be exposed to violence without fear of reprisal” since the crucial social link between them and the community is missing.

¹⁵⁵ De Souza Martins “Lynchings – Life by a Thread” in *Vigilantism and the State in Modern Latin America* 26.

¹⁵⁶ 26.

¹⁵⁷ The terminology used to describe outsiders echoes this sentiment. See, for instance, the use of the word “infest” to describe the how the “miscreants” of the opening quote are taking over, and Garland’s conception of the Other as a “monstrous creature”.

¹⁵⁸ Baker *Lawless Law Enforcers in Africa* 145.

vigilantes,¹⁵⁹ who are imbued with right “to decide on life and death [and] the capacity to visit excessive violence on those declared enemies and undesirables”.¹⁶⁰ For as long as the mindset that “criminals haven’t got rights. Human rights for criminals is a sjambok on the buttocks”¹⁶¹ is prevalent, the Other will be viewed as undeserving of the privilege and protection of human rights, and vigilantes’ brutal treatment of them will be accorded legitimacy.

5.3.2.3 *Exorcising evil*

Vigilantes also direct their violence towards the literal exclusion of their enemies, either by banishing them from the community¹⁶² or by killing them. Elimination from the community – “social death”¹⁶³ – is a severe sentence. Losing access to local support networks, in the words of one of Buur’s interviewees, is “the worst that can happen to a person living in the township – to be alone.”¹⁶⁴ As already noted, vigilante killings often exhibit an excessive degree of force, potently expressing the perceived worthlessness and enemy status of their victims, who are often tortured or mutilated prior to being dispatched, frequently by burning. “Necklacing” is a particularly popular killing-method in South Africa. Not only is the victim’s death exceptionally excruciating, but the burning of the body also symbolises purification, with the flames signifying “the total elimination of the defilement that had endangered the health, well-being and order of the community”.¹⁶⁵ Death by burning is also particularly final, destroying the soul as well as the body and preventing it from returning to haunt the living – an important consideration in witch-killings.¹⁶⁶ Similarly, De Sousa Martins argues that the “rites of disfiguration” frequently accompanying Brazilian lynchings preclude the deceased from

¹⁵⁹ Buur *Outsourcing the Sovereign: Local Justice and Violence in Port Elizabeth* 23.

¹⁶⁰ Hansen & Stepputat (2006) *Annual Review of Anthropology* 301.

¹⁶¹ Monhle John Magolego, founder of *Mapogo A Mathamaga*, quoted in Montana (1999) *Focus* 4.

¹⁶² See Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 202-203 for an example of two sons who were ordered to leave their father’s house and not come back because they had disrespected their father.

¹⁶³ 204.

¹⁶⁴ 203.

¹⁶⁵ Chidester *Shots in the Streets* 48-49.

¹⁶⁶ Crais *The Politics of Evil* 130; see also Chidester *Shots in the Streets* 50; also Nel (2014) *Acta Criminologica* 31.

achieving redemption through burial, thus furthering their damnation and demonstrating their “exclusion from the human species”.¹⁶⁷

Executing their victims may therefore be understood as a symbolic way for vigilantes to expel evil in order to “re-negotiat[e] the wholeness of a community”¹⁶⁸ disrupted by violence, fear, misfortune and marginalisation. As has been shown, this exercise of vigilante power is portrayed as a collective and empowering rite of normative self-legitimation. It will be explained further below¹⁶⁹ that in their endeavours to be accorded a mass mandate, vigilantes include sufficient elements of the formal criminal justice process for their ‘law-enforcement’ to seem reassuringly familiar and conventional, whilst also gratifying punitive sentiments by giving participants’ basic urge for violent retribution against wrongdoers free rein. The “momentary, spontaneous, violent unanimity achieved by a community”¹⁷⁰ through the permanent elimination of their perceived enemies demonstrates vigilantes’ heroic ability to defend the community against the evil forces that threaten to destroy social order and collective security, thus enhancing their normative legitimacy. It is also a powerful expression of vigilantes’ own legitimacy-enhancing power. The methods that vigilantes employ to delegitimize the state and to demonstrate their own counter-legitimate authority will now be elaborated on.

5 4 Demonstrative counter-legitimation

As explained in § 3 6, public actions demonstrating recognition of a particular power relationship are essential for those in power, serving not merely as expressions of subordinates’ belief in power-holders’ legitimacy, but actually conferring – and contributing to the enhancement of – the dominant’s legitimacy. The powerful are legitimated when those subject to their power symbolically communicate their willingness to submit to power-holders’ moral authority. The opposite of demonstrative legitimacy, namely delegitimation,

¹⁶⁷ De Souza Martins “Lynchings – Life by a Thread” in *Vigilantism and the State in Modern Latin America* 29.

¹⁶⁸ Chidester *Shots in the Streets* 50.

¹⁶⁹ At §§ 5 4 1 1 and 5 4 1 2.

¹⁷⁰ Chidester *Shots in the Streets* 32.

occurs when there is an active withdrawal of such consent. The ultimate demonstration of delegitimation entails subordinates collectively laying claim to the moral authority of the powerful by presenting themselves as an alternative source of legitimate power. In this section performative acts denoting both the unwillingness of vigilantes to submit to the state's criminal justice authority, and corresponding vigilante expressions of counter-legitimation, are considered. It will be shown how vigilantes demonstrate their opposition to a state they perceive to be unsatisfactory, whilst also engaging in counter-legitimation practices that "require fluency in the 'languages of stateness'".¹⁷¹ Many vigilante actions may be understood both as "explicit indictments"¹⁷² of the modern justice system and mocking reproductions of it. The former aspect – the challenge vigilante acts pose to demonstrative state legitimacy – is explored first, followed by an analysis of vigilante attempts to demonstrate that they are a viable alternative source of legitimate power in the sphere of criminal justice.

5 4 1 Vigilantism as a form of power-play undermining state legitimacy

Despite not having a predominantly political motive, vigilante violence is nonetheless an inherently political act, since vigilantes in effect "co-opt the position of power that is normally the reserve [sic] of the criminal justice system".¹⁷³ In the previous chapter, it was argued that vigilantism is a reaction to the profound sense of powerlessness experienced by citizens upon being confronted with inadequate state protection. Vigilantes' harsh "punishments" may consequently be understood as a public display of unorthodox sovereign might – a "display of raw power"¹⁷⁴ that serves as a "perverse form of community empowerment".¹⁷⁵

¹⁷¹ Pratten (2008) *Africa* 6.

¹⁷² Snodgrass Godoy (2004) *Theory and Society* 637.

¹⁷³ Silke (2001) *The Police Journal* 126; also De Souza Martins "Lynchings – Life by a Thread" in *Vigilantism and the State in Modern Latin America*.

¹⁷⁴ Garland (2005) *Law and Society Review* 817.

¹⁷⁵ Snodgrass Godoy (2004) *Theory and Society* 640.

Vigilante violence is a double discreditation of state legitimacy, an implicit denunciation of state policing power that happens on two levels. On one level, it challenges state authority in that vigilantes flout criminal sanctions prohibiting unjustified violence – i.e., it undermines the state’s claim to a monopoly on the use and allocation of coercive force. Vigilantism’s non-state-sanctioned and violent character has been explored at length in chapter 2, and will therefore not be revisited here. Suffice it to say that all vigilantism unlawfully appropriates the state’s power to punish to some degree. On a second level, vigilante violence may contest the state agenda in the sense that vigilantes disregard state tenets in respect of the content or enforcement of criminal norms. Vigilante counter-legitimation in resistance to the state takes the form of “defining a counter-narrative of power by not only creating alternative freedoms but also by imposing different inequalities and exclusions”.¹⁷⁶ In this sense vigilantism is “counterhegemonic”:¹⁷⁷ vigilantes claim the authority to replace the existing power hierarchies with new ones that give expression to community values and priorities concerning the definition or enforcement of standards of behaviour that are contrary to those espoused by the state. Once again, this aspect has already been covered in chapter 4, where first and second-order dissonance were discussed. What is clear is that vigilantes’ imposition of harsh punishments, their disregard for due process and their policing of morality as well as criminality are a means of “claiming the power to impose an alternative [political] order”.¹⁷⁸

¹⁷⁶ Wood (2003) *Crime, History and Societies* para 28.

¹⁷⁷ Nina (2000) *African Security Review* 21.

¹⁷⁸ Wood (2003) *Crime, History and Societies* para 29.

5 4 1 1 *Legitimation rituals¹⁷⁹ mirroring those of the state: characteristics and comparison*

In disregarding the externally imposed restraints of state law and procedure by flouting criminal prohibitions and imposing alternative rules and punishments, vigilantes proclaim a distinctive communal identity and define themselves as sovereign in opposition to the state.¹⁸⁰ Interestingly, while they invert the state's notions of law and lawlessness to serve their own ends, seemingly rejecting the official justice system in favour of an autonomous, community-initiated substitute, vigilante "justice" is often carried out in a manner that crudely parallels the functioning of the formal justice system.¹⁸¹ Now that the general notions of state delegitimation and corresponding vigilante demonstrative legitimation have been considered, the focus shifts to particular vigilante rituals and practices that mirror state activities and the language of the law.

To be recognised as a credible guarantor of collective security, vigilantes need to represent their exercise of power as comparable with, but superior, to conventional law-enforcement. Barker observes:

"[T]he way in which people legitimate their political identities will often be a deliberate reversal of the legitimation of rulers, using, and inverting, the symbols and claims of those they oppose to express their own identity, grievances or claims."¹⁸²

Vigilantes do indeed appear to engage in such "legitimation by association", consciously mimicking the forms and rituals of criminal punishment in an apparent attempt to disguise the distinction between formal and informal justice. Vigilantes' appropriation of elements from state criminal justice serves a variety of functions. It may reveal an implicit desire for

¹⁷⁹ Here, "ritual" is used in Bell's sense of "ritualisation", which she views as a "way of acting that is designed and orchestrated to distinguish and privilege what is being done in comparison to other, usually more quotidian, activities. As such, ritualization is a matter of various culturally specific strategies for setting some activities off from others, for creating and privileging a qualitative distinction between the 'sacred' and the 'profane', and for ascribing such distinctions to realities thought to transcend the power of human actors" (C Bell *Ritual Theory, Ritual Practice* (1992) 74).

¹⁸⁰ Garland (2005) *Law and Society Review* 816; 818.

¹⁸¹ Snodgrass Godoy (2004) *Theory and Society* 637.

¹⁸² Barker *Legitimizing Identities* 115-116.

legitimation from the communities they “serve” in that where aspects of their activities appear reassuringly familiar, “law-abiding” community members might be more likely to identify with and legitimate their violent conduct.¹⁸³ Mirroring the ritual forms of state punishment also stresses the communal, as opposed to private, nature of vigilante acts, thereby inviting collective recognition and legitimation.¹⁸⁴ In addition, drawing attention to the similarity between formal and informal law enforcement may enhance vigilantes’ own unofficial authority¹⁸⁵ as competent “crime-fighters” by making a mockery of the state’s claim to exercise exclusive power in respect of guaranteeing collective security and social order.

Snodgrass Godoy agrees with Durkheim’s characterisation of repressive justice (such as vigilantism) as having a “certain religious stamp”¹⁸⁶ in that it is a community rite possessing a “quasi-religious character”.¹⁸⁷ Garland describes the public torture lynchings of the American South as being “more like acts of war than acts of worship”,¹⁸⁸ but he nevertheless characterises them as a kind of ritual. The same may be said about much contemporary mob justice. Vigilantism as a ritual has certain distinctive characteristics. Even vigilantism that is initially spontaneous and reactive tends to be, once it is under way, “generally shaped and sequenced by a familiar script”, producing a “performance with a distinctive form and character”.¹⁸⁹

First, vigilantes seek to represent their conduct as a “*collective* rite”¹⁹⁰ akin to criminal punishment – a means of “acting out communal outrage”.¹⁹¹ Their aim is to acquire the public authority that comes with the crowd: amassing a mob is an “officialising” gesture¹⁹² in the face of weak or

¹⁸³ See Jean & Brundage “Legitimizing “Justice”” in *Informal Criminal Justice* and §§ 5 2 1 and 5 2 1 1 for more in the context of legal legitimacy.

¹⁸⁴ See Garland (2005) *Law and Society Review* 807-808.

¹⁸⁵ See Little & Sheffield (1983) *American Sociological Review*.

¹⁸⁶ Durkheim *The Division of Labour in Society* 56, a different translation to the one quoted in Snodgrass Godoy (2004) *Theory and Society* n 69.

¹⁸⁷ Snodgrass Godoy (2004) *Theory and Society* 636.

¹⁸⁸ Garland (2005) *Law and Society Review* 807.

¹⁸⁹ 808.

¹⁹⁰ Snodgrass Godoy (2004) *Theory and Society* 338.

¹⁹¹ Garland (2005) *Law and Society Review* 820.

¹⁹² Bourdieu (1990) *The Logic of Practice* 108 cited at 817.

contested state governance. Buur also notes that the “angry mob” “may be the ultimate image of sovereign power” – an authority capable of “interpreting and conveying the commands of the silent majority in the most powerful manner”.¹⁹³

Second, mob justice is a *public* ritual, not a private act. Instead of being covert, the fact that there is mass participation that is witnessed by many politicises it, “converting its significance from an act of unlawful violence into a law of its own”.¹⁹⁴ For example, Oomen describes the sjambokking sessions carried out by *Mapogo A Mathamaga* members as an “open critique” of the state: They took place in broad daylight with as many spectators as possible, and even the media were invited to attend. Having caught, interrogated and punished criminals, they would dump their bleeding bodies on the doorstep of local police stations.¹⁹⁵ Similarly, the Nigerian Bakassi Boys’ executions of alleged violent criminals “typically took place in prominent public spaces” and attracted large crowds of observers.¹⁹⁶ In her analysis of the incident referred to in § 5 3 2 1 during which a housebreaker was badly assaulted, stripped naked, painted and forced to stand on top of an electric box, Harris emphasises that this created a physical and symbolic distance between the vigilante victim and the rest of the community, and notes the irony that his isolation – and the message it conveyed to those witnessing it – depended on his “remaining fully in the public eye”.¹⁹⁷

A third characteristic of the vigilante ritual is that vigilantes attempt to enforce obedience and demonstrate their capacity to impose their authority by *instilling fear*. This aspect is linked with the two characteristics already identified, particularly with the idea of vigilantism as a public spectacle. Since this dimension of vigilantism has not yet been explored, some elaboration is required. Vigilante violence is indeed a fear-inducing display of extreme power, a potent message intended to enforce respect for vigilantes’ legal legitimacy by showing that they are able to exert control over criminals and

¹⁹³ Buur (2009) *Critique of Anthropology* 28-29.

¹⁹⁴ Garland (2005) *Law and Society Review* 817.

¹⁹⁵ Oomen (2004) *African Studies* 167.

¹⁹⁶ Smith (2004) *Cultural Anthropology* 431.

¹⁹⁷ Harris *As for Violent Crime That’s Our Daily Bread* 24-25.

community members alike, thus cementing respect for vigilante authority – a vital component of legal legitimacy.¹⁹⁸ Fear and vigilantism go hand-in-hand, with vigilantism engendering fear both in those directly subject to vigilante violence and in those who witness it being inflicted. Harris states that vigilantism, “by virtue of its public and violent nature, pivots on fear”.¹⁹⁹

The open enactment and violence inherent in vigilantism is indeed fear-inducing. As was discussed in §§ 2 6 3 1 and 2 6 3 1 1, vigilante violence conveys a potent message to its specific target, aimed not only at punishing the present misdeed, but also at compelling continued desistance on pain of further punishment. In instances where the vigilante victim is killed, the objective is not individual deterrence, but absolute, permanent prevention – incapacitation – instead. Vigilante violence also serves an exemplary function for the community at large, discouraging prospective challenges to vigilante authority in two distinct ways. First, it is intended to deter future disobedience by intimidating potential offenders. Warning the disorderly against eroding the values vigilantes hold dear thus also serves the crucial symbolic function of violently sanctifying deeply cherished societal values.²⁰⁰ Second, the “aura of fear”²⁰¹ that vigilantes build up around themselves makes non-participating bystanders reluctant to report witnessed vigilante attacks to the police for fear of being intimidated or being labelled informers, and so risk becoming targets of vigilante violence themselves.²⁰² The fear-induced conspiracy of silence shrouding vigilantism,²⁰³ which is engendered by public and brutal displays of vigilante violence, goes a long way towards explaining the persistence of vigilantism. And since vigilantes are seldom apprehended and punished, owing to a lack of reliable evidence against them, they feel empowered to continue engaging in their activities with impunity.²⁰⁴

¹⁹⁸ See Beetham *Legitimation of Power*.

¹⁹⁹ Harris *As for Violent Crime That's Our Daily Bread* 20.

²⁰⁰ Brown “The History of Vigilantism in America” in *Vigilante Politics* 81.

²⁰¹ Minnaar “The 'New' Vigilantism” in *Informal Criminal Justice* 119.

²⁰² Another reason they may be unwilling to come forward or reveal details, of course, is that they support those carrying out the acts of vigilantism.

²⁰³ Swanepoel & Duvenhage (2007) *Acta Academia* 126-127 view the vigilante conspiracy of silence as so fundamental to its nature that they identify it as one of vigilantism's defining elements.

²⁰⁴ The SAPS *Bundu Courts Report* makes for depressing reading in this regard. Time and time again the police arrive at a scene of vigilante violence, and identify what appear to be many potential

A fourth defining characteristic of the collective performance of mob justice is that it involves “a set of formal *conventions and recognizable roles*; a staging that [is] standardized, sequenced, and dramatic; and a recognized social meaning that [sets] the event apart as important, out-of-the-ordinary, highly charged in symbolic significance.”²⁰⁵

State criminal justice rituals share all these characteristics of ritual mob justice, namely public participation, favouring openness as opposed to secrecy, being fear-inducing and having a recognisable law-enforcement “script”:

First, as regards the opportunity for citizen involvement in decision-making and in the criminal justice process, § 3 7 above cites numerous extracts from case law reiterating that public participation enhances legitimacy. Needless to say, without active and widespread citizen participation the key constitutional ideal of democratic governance cannot be realised.

Second, in respect of openness, judicial opinion highlighting the link between legitimacy and the need for justice to be seen to be done is also cited in § 3 7. Openness is seen as a foundational constitutional value, with limitation of rights only being possible in terms of a law of general application, and then only “to the extent that the limitation is reasonable and justifiable in an *open* and democratic society based on human dignity, equality and freedom”.²⁰⁶ The right to have legal disputes settled in a “fair *public* hearing” is recognised in section 34 of the Constitution, and the right to a public criminal trial is also protected in section 35(3)(c),²⁰⁷ showing once again that

witnesses, but they seem to melt away when the police arrive. One of the reports notes, “[SAPS members] further noticed a group of community members that were standing not far from the victim’s body, but none of them would give information as to what transpired” (15). Another one simply notes tersely, “No witnesses came forward” (27). See Knox & Monaghan *Informal Justice in Divided Societies*; Minnaar “The ‘New’ Vigilantism” in *Informal Criminal Justice* 120-121. Swanepoel & Duvenhage (2007) *Acta Academia* 120 identify another reason that vigilantes being protected by a conspiracy of silence might be detrimental: it increases the danger that the state will not realise the extent of the vigilantism problem “until its authority has been undermined to a point where it cannot be rectified without brute force”.

²⁰⁵ Garland (2005) *Law and Society Review* 807 (emphasis added).

²⁰⁶ S 36(1) Constitution of the Republic of South Africa, 1996 (emphasis added).

²⁰⁷ Emphasis added.

public access and openness is highly prized in the contexts of both civil and criminal dispute resolution.

Third, as to instilling fear, the entire formal criminal justice system is overtly coercive, premised on enforcing respect for the state's exercise of power by inducing obedience through threat of punishment. The state does not merely forbid conduct it deems undesirable, but backs up its prohibition by threatening to inflict pain and suffering on those who disobey. The assumption underlying criminalisation is that making citizens afraid of the unpleasant consequences of deviant or antisocial behaviour will deter them from stepping out of line, with the criminal justice system being the means by which the state attempts to make good the threat of punishment should citizens not be sufficiently deterred. Just as is the case with vigilante punishment, the deterrent effect of fear of state punishment is intended to operate both on the level of the one being punished (having been punished, they will not wish to undergo such suffering in the future again) and those witnessing the punishment (witnessing another's punishment will dissuade them from crime so as to avoid bringing similar suffering upon themselves).

Fourth, it need scarcely be mentioned that the process of administering state criminal justice is by its very nature formal, standardised and ritualistic, involving a host of self-legitimation rituals as a means for the state to "sanctify" its moral authority in the criminal justice sphere. These formalities and traditions are deemed so central to the state's depiction of its exercise of power as sacrosanct and exalted (and hence legitimate) that undermining them is subject to formal denunciation. For example, violating the dignity of a judicial body – even in respect of such trivial matters as appearing in court improperly dressed – is punishable as contempt of court.²⁰⁸

It is clear from the above that both vigilantes and the state engage in demonstrative rituals of self-legitimation. In order to appreciate fully the parallels between the rituals of the formal criminal justice system and those of vigilantes, it is useful to identify some specific instances of similarity. For this reason, examples of how vigilantes mirror the state, particularly in respect of

²⁰⁸ See Burchell *Principles* 838-841.

the “formulaic character”²⁰⁹ of the “piece of political theater”²¹⁰ that is an act of collective vigilantism – its “criminal justice” process from the stage of investigation to punishment – are now considered in more depth.

5 4 1 2 Legitimation rituals mirroring those of the state: examples and analysis

Extract from Ivory Park Peoples’ Court *Code of Punishment*

Adultery: 500 lashes for the man and banishment or 500 lashes for the woman.

Murder: Necklacing or execution at gunpoint.

Rape: Paraded naked before receiving 400 lashes, or execution.

Child abuse: 380 lashes and banishment.

Motor vehicle hijacking: Death for repeat offenders. Lashes or execution for first timers.

Theft: 50 lashes.

Burglary: 200 lashes for first offence. If items not returned to owners, extra 300 lashes.

Assault: 90 lashes.

Assault by a man on his wife: 50 lashes.

Contempt of court: An additional 40 lashes and a two-year banishment from the area.

– quoted by A Minnaar (2001) *Institute for Human Rights and Criminal Justice Studies* 50.

²⁰⁹ Garland (2005) *Law and Society Review* 804.

²¹⁰ 808.

What follows are practical illustrations of how vigilante groups identify “perpetrators”, who are “arrested” following “investigations” involving “interrogation”, summoned to appear in “court”, “tried” by “judges” in “people’s courts” (which may entail complaints being raised against them by their “accusers” and their being given the opportunity to “plead” and “defend themselves”), “convicted” and “sentenced” to prescribed – and even occasionally formally codified²¹¹ – “penalties”.

The first example is a typical act of spontaneous vigilantism, and is taken from the factual scenario of the unreported *S v Mvabaza and others*.²¹² A Khayelitsha resident was robbed of her money, cell phone and handbag in the early morning hours on her way to work. The victim ran home, weeping, and reported the robbery to her mother and father (accused 1). She phoned the police using her mother’s phone. Accused 2, 3 and 5 witnessed the robbery while they were sitting and drinking. They chased the robbers and caught one of them (the deceased). They dragged him by the belt to accused 1’s house, where other community members joined them. The deceased was assaulted with sticks and stones. The victim was asked whether the deceased had robbed her, and her response was that she was unsure whether she could identify the robbers due to her shocked state. By that stage the deceased had been assaulted so severely that he was “covered in blood”.²¹³ His feet were tied with rope. He told the group that he could go and point out the things that were stolen, and he was transported some distance in the boot of accused 1’s car to look for the stolen goods. The search was fruitless and the cars returned to accused 1’s house, dropping the deceased off at the street corner nearby. Accused 1 instructed his daughter to phone the police again as well as asking his friend to fetch the police. Shortly afterwards, the deceased was assaulted with sticks by about 30 “unnamed members of the group”. Some time later a police constable found him dead with a car tyre on his body and the lid of a concrete drain cover on his chest.

²¹¹ See the Ivory Park Peoples’ Code of Punishment. Note also the conservative and patriarchal standards of morality implicit in this Code – e.g., assault by a man on his wife is viewed in a less serious light than other forms of assault.

²¹² *S v Mvabaza and others* Case no. SS62/2012; decided 2013-05-14 (WCC).

²¹³ Para 6.

Despite the fact that it took place on the spur of the moment as an immediate response to a crime just committed, this incident is nevertheless by no means a “wild [outburst] of spontaneous violence”.²¹⁴ On a superficial level the sequence of events closely mirrors the formal criminal justice process: A crime is witnessed; a suspect is arrested following a pursuit; the suspect is brought to a place of judgment (accused 1’s house, in this case); the victim is asked to identify her assailant; the suspect is interrogated and confesses; an attempt is made to obtain further evidence and identify other suspects; upon returning to the place of judgment, a (death) sentence is decided upon and carried out.²¹⁵

The second example is an instance of a less spontaneous vigilante investigation that does not culminate in vigilante-style “punishment”, but is nevertheless a faithful approximation of formal methods of criminal investigation. In the factual scenario of *S v T*,²¹⁶ the mother of a 9-year-old victim of indecent assault reported the matter to members of the local street committee in addition to the police. The street committee members identified an individual (the accused) on the basis of the description given by the victim’s mother (he had a defective eye and scars on his face). The accused was visited by four street committee members and was “invited”²¹⁷ to attend a street committee meeting to discuss the matter. An informal identity parade was then carried out, during which the accused, a man with a false eye, and another with a squint were seated among the male members of the street committee. The victim and a friend who had been with him were requested to

²¹⁴ Garland (2005) *Law and Society Review* 797.

²¹⁵ See *Mzanywa v Minister of Safety and Security* for a vigilante scenario which, although less spontaneous, followed a similar “script” to *S v Mvabaza and others*: Members of the community resolved at a meeting to assault three people suspected of stealing. Community members went looking for them, and upon finding them, assaulted them severely. The suspects were then taken to a school and questioned about the stolen goods. When they denied having stolen them, community members assaulted them with sjamboks. See also *Zuko v S*, referred to in § 4 3 2: A robbery victim, after having reported a robbery to the police, identified a man he thought was one of the robbers. He then contacted members of a vigilante group of which he was a member, and they proceeded to the shack the victim had seen the suspect enter earlier that day. They entered the shack without seeking or obtaining the suspect’s consent, and the victim’s firearm was recovered. The suspect was assaulted in his shack to force him to take the vigilantes to his co-accused, which he duly did. The next morning the vigilantes handed their severely injured captives over to the police.

²¹⁶ *S v T* 2005 2 SACR 318 (E).

²¹⁷ Para 9; inverted commas in the original! The clear implication is that the judge was of the view that duress was involved.

identify the assailant, which they both duly did. The police were then called and the accused was arrested. The accused was convicted in the magistrates' court; however, on appeal his conviction was set aside on the basis that the informal identity parade had tainted the process to such an extent that even a later identification could not properly be relied upon.

This example shows clearly the intimate relationship between formal and informal justice, as well as the tensions that may arise when they attempt to act as security providers in the same realm. The street committee members seemed happy to work with the police, handing the suspect over to them directly after the "identity parade", and their conduct also speaks to their seeming readiness to accommodate and utilise the techniques of justice-seeking offered by the state, but to employ police tactics "in a creative manner"(!).²¹⁸ These vigilantes appeared to be under the *bona fide* impression that the authorities would condone – even applaud – their "investigation" and that it would result in a criminal receiving deserved punishment. As was the case in *Mvabaza*,²¹⁹ the victim's mother was willing to hedge her bets as far as provision of security was concerned. She approached the police as well as the vigilantes for help – but significantly, she only reported the crime to authorities two days after the incident, having been advised to do so by the doctor who examined her son, whereas the local street committee was her first port of call.²²⁰ Even the court a quo was prepared to condone the extra-legal vigilante-style justice provision, with the magistrate convicting and sentencing the accused on the strength of the "identification parade". However, while the consumer and co-provider of community security, as well as the initial arbiter of criminal justice, were inclined to accommodate a deviation from the letter of the law in pursuit of a seemingly just outcome, the appeal court judge was not. Plasket J stated in

²¹⁸ T Grätz "Dévi and his Men: The Rise and Fall of a Vigilante Movement in Benin" in T G Kirsch and T Grätz (eds) *Domesticating Vigilantism in Africa* (2010) 92.

²¹⁹ See above.

²²⁰ This is an example of what Baker (2004) *Journal of Contemporary African Studies* 170-171 terms "multi-choice policing": Policing, in his view, is not just diverse or private, but is rather a complex pattern of *overlapping agencies* with people's experiences and choices related to policing being based on what is available, what works best and what is affordable, not who controls the policing body and to whom they are accountable. Baker also confirms that in most situations Africans look first to non-state agencies for crime protection and crime response (Baker *Security in Post-Conflict Africa* 39).

no uncertain terms that there was “no basis upon which the street committee could justify its usurpation of the investigative functions of the police”,²²¹ and directed street committees instead “in future, [to] ensure that [they work] with the police in the combating of crime by providing relevant information to the police so that a proper investigation can be conducted”.²²² Ironically, it is highly probable that the street committee members would have characterised their “identification parade” as doing precisely as the judge suggests: co-operating with the police and supplying them with useful information. They would in all likelihood have agreed with the Nigerian Bakassi Boys when they stated openly that they had no problem with the police: “We work for the same goal of making [the] state free of criminals”.²²³ This disconnect between formal and informal justice provision concerning the extent to which (laudable) ends should be allowed to justify (questionable) means in the criminal justice sphere is raised again in chapter 7.

A third example of a vigilante legitimisation ritual that mirrors that of the state comes from Buur’s ethnographic research into the *modus operandi* of the *Amadlozi* vigilante group operating in Port Elizabeth, and its observations confirm those of the case law findings referred to above. Buur notes that *Amadlozi* “working groups” “conduct raids that resemble ordinary police investigations or operations”,²²⁴ and also approach suspects, “hunt down criminals”, summon people and enter premises for investigative purposes. Buur²²⁵ outlines one of the “quasi-court sessions” of the *Amadlozi* taking place in a local classroom, which parallels the processes of formal justice with eerie precision: The “accused” were summoned to appear in the “court”; there was “testimony” against them by their “accuser”; the “accused” were given the opportunity to give their side of the story and defend themselves; the “judge” (the chairperson) then asked community members in the audience for advice, as well as asking the “accuser” what he wanted the “court” (the *Amadlozi*) to do; the “judge” gathered the “executioners” (*Amadlozi* youths) and got the

²²¹ *S v T* para 39.

²²² Para 40.

²²³ *Vanguard Daily* (200-12-16), quoted in Baker *Lawless Law Enforcers in Africa*.

²²⁴ Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 201.

²²⁵ 202-203.

accused to accompany them to a house; when they returned the accused had clearly been administered corporal punishment. The chairperson then imposed an additional punishment: the accused were ordered to leave home – a sentence of banishment or “social death”.²²⁶ The most significant difference between this example and the case law cited earlier is that in this instance the “offence” committed by the accused was not criminal in nature: they were accused of having shown disrespect towards their father. The ritual is in other respects very similar.

A fourth example highlights another form of vigilantism that punishes deviant but non-criminal behaviour, namely anti-witchcraft violence. Here again, the traditional witch-hunting process tends to replicate very faithfully the rituals of the formal criminal justice system: Misfortune occurs; an expert (a diviner) is consulted to detect the person responsible; the witch is identified by techniques considered reliable by all parties concerned (such as smelling-out or pointing-out); the witch is publicly named and apprehended; they are found guilty and are not given the opportunity to repent; there is collective consensus that they should be eliminated; and punishment is carried out.²²⁷

Some interesting insights may be gleaned from these examples: First, vigilantes are not necessarily “anti-police” *per se*. In both instances where the “wrongs” being policed were capable of enforcement by the state authorities, the authorities were contacted and their assistance was requested, implying that community members had not completely abandoned faith in formal justice (see examples one and two). Indeed, in *S v Mvabaza* the court considered the fact that accused 1 had asked a friend to report the incident to the police as evidence of his dissociation with the deceased’s subsequent death, and acquitted him of murder on this basis.²²⁸ This positive observation from the state’s perspective is picked up on by the Khayelitsha Commission report. In citing the findings of the Mthente survey, the Commission notes that while the

²²⁶ 204.

²²⁷ See Nel (2014) *Acta Criminologica* 30. See also W E A Van Beek “The Escalation of Witchcraft Accusations” in G Ter Haar (eds) *Imagining Evil: Witchcraft Beliefs and Accusations in Contemporary Africa* (2007) 307-311 for an interesting model explaining the escalation of witchcraft violence from social tension to witch-execution.

²²⁸ *S v Mvabaza and others* para 47. He was convicted of assault with intent to do grievous bodily harm instead (para 48).

survey indicated high levels of distrust of the police in Khayelitsha and high levels of dissatisfaction with the service provided by the police in Khayelitsha, it also indicated that the majority of residents do not consider vigilante action as justified. This is encouraging, observes the Commission, in that “it suggests that the majority of residents in Khayelitsha want criminal conduct to be dealt with in a fair manner, and consistently with the rule of law.”²²⁹ In other words, a trustworthy and efficient formal criminal justice system is viewed as first prize even in crime-ridden, vigilante-prone and marginalised communities, with vigilantes playing the role of a necessary but interim stop-gap.

Second, a sanguine reading of these examples would seem to imply that vigilantism would inevitably vanish if the formal criminal justice system executed its tasks optimally. Yet the legal and extralegal administration of justice actually appear to be complementary instead of contradictory, with vigilantism being a “preferred alternative to ‘official’ justice” rather than a substitute for it in certain circumstances.²³⁰ Kirsch and Gratz characterise vigilantism as “a specific way of executing state power”,²³¹ implying that it cannot be distinguished unequivocally²³² from state justice. In this vein, too, Baker²³³ situates vigilantism and state policing together as two of the many options forming part of the continuum of security providers – there is no “either-or”. Indeed, Loader (although not specifically with reference to vigilantism) goes so far as to say that the fragmentation of policing may create or reinforce new cultural meanings “which valorise consumer choice in the field of policing and stigmatise dependence on the state”.²³⁴ Thus law and vigilantism are not automatically “entwined in a relationship of mutual exclusion”,²³⁵ with the scope for vigilantism shrinking in inverse proportion to the influence of the formal criminal justice system. Their respective spheres

²²⁹ O'Regan & Pikoli *Khayelitsha Commission Report* 134.

²³⁰ Garland (2005) *Law and Society Review* 798. See also Baker *Multi-Choice Policing* and Baker (2004) *Journal of Contemporary African Studies*.

²³¹ Kirsch & Grätz “Vigilantism, State Ontologies & Encompassment” in *Domesticating Vigilantism in Africa* 10.

²³² Buur (2006) *Development and Change* 750.

²³³ Baker *Multi-Choice Policing* 79.

²³⁴ Loader (1999) *Sociology* 383.

²³⁵ J Reider “The Social Organization of Vengeance” in D Black (eds) *Towards a General Theory of Social Control Volume 1: Fundamentals* (1984) 134.

of influence are not antagonistic and may well overlap considerably, since they profess a mutual allegiance to the regulation and control of crime²³⁶ and have a shared “language of authority”.²³⁷ The conduct of accused 1 in *S v Mvabaza* illustrates this point well: he took the law into his own hands, punishing the man who had robbed his daughter by assaulting him with his fists and an iron rod,²³⁸ yet he also chose to summon the police to deal with the suspect; in his mind, the options were by no means mutually exclusive. Needless to say, where non-criminal norms are being enforced (as in examples three and four) resorting to state justice is not an option. Vigilantes are the only resource available to safeguard such social or moral standards. All in all, in the context of “frontier” communities the idea that the state could ever achieve a monopoly on the use of crime-fighting force seems at best far-fetched and theoretical, with vigilantes invariably being afforded many opportunities to demonstrate their influence in the “crime-fighting” sphere.

Third, even where vigilantes have demonstrated their own power and legitimacy by successfully emulating state justice processes in many respects, there remains a blatant contrast between formal and informal “criminal justice” – both in instances where the criminal norms are shared by the state (examples one and two) and those where they are not (examples three and four). This distinction lies in the respective means considered necessary to punish deviance and in vigilantes’ denial of the due process safeguards intrinsic to formal justice. Despite vigilantes’ attempts to portray their power as the ritual carrying out of community-endorsed “deserved punishment” following a “guilty verdict”, the often exceptionally brutal and intentionally cruel methods used to obtain “evidence” and execute “sentences” starkly expose its disproportionate and excessive nature. The “punitive excess” characterising much vigilantism represents a deliberate rejection of the removed, restrained and impersonal tone of the formal criminal justice process in favour of an

²³⁶ *Contra* Little & Sheffield (1983) *American Sociological Review*; Rosenbaum & Sederberg “Vigilantism: An Analysis of Establishment Violence” in *Vigilante Politics*.

²³⁷ Buur (2006) *Development and Change* 750.

²³⁸ *S v Mvabaza and others* para 48.

impassioned, unmediated, communal, almost intimate, means of dispensing “wild justice”.²³⁹

The exercise of vigilante power is thus portrayed as a collective rite of self-legitimation incorporating what vigilantes perceive to be the “best” features of both formal and informal justice: a recognisable “law-enforcement” ritual combined with the opportunity for a socially-sanctioned, cathartic release of unrestrained righteous anger.

5 5 Conclusion

This chapter has shown how vigilantes constitute themselves as viable alternative bearers of legitimacy in the criminal justice sphere. A discussion of the three main aspects of vigilante counter-legitimation has convincingly established that from a state perspective, vigilantes’ considerable popular appeal vis-à-vis that of formal law-enforcement is founded on an ingenious combination of the familiar²⁴⁰ and the foreign.²⁴¹ This chapter also confirms the value of Beetham’s three legitimacy components in forming the foundation of an explanatory framework for exploring vigilante attempts to legitimate their violent acts to others. The moral authority upon which their popular mandate is based – including an appeal to popular sovereignty and the use of corporal punishment – affords vigilantes a measure of legal legitimacy; the social utility of vigilantism with reference to its power to unite communities against a common enemy provides vigilantism with normative legitimacy; and vigilantes’ ability to perform state-like ritualistic acts in the criminal justice sphere reveals the demonstrative dimension of vigilante legitimacy.

What must be considered next is how the state may best respond to vigilante claims to share legitimacy in the criminal justice arena. It is hoped that the insights arrived at regarding vigilante counter-legitimation may prove

²³⁹ Garland (2005) *Law and Society Review* 817-818; S Jacoby *Wild Justice: The Evolution of Revenge* (1985).

²⁴⁰ E.g., accountability, a democratic (populist) mandate and the enforcement of social order and collective security in ways that uphold recognised conventions and formalised rituals.

²⁴¹ E.g., extreme violence and punitiveness, the widespread use of corporal punishment and the capacity to ward off supernatural threats.

beneficial to the state in its quest to portray itself as a credible bearer of crime-fighting authority, directing it towards (re)legitimation strategies that play to its own strengths without downplaying the valid security concerns of vigilantes and the communities they serve. The state's main re-legitimation options are either to discredit and/or exclude vigilantes, or to counteract their authority through incorporating or formalising their crime-fighting power in some way. These seemingly contradictory aspects are the focus of chapters 6 and 7 respectively.

6 CHAPTER SIX: STATE RELEGITIMATION THROUGH EXCLUSION

6.1 An introduction to exclusionary state strategies: the “zero-sum game”¹?

The study has thus far explored factors contributing to erosion of state legitimacy in the criminal justice sphere, and corresponding vigilante endeavours to legitimate themselves as alternative guarantors of collective security and social order. The following two chapters consider possible state responses to vigilantism – specifically, what steps the state might take to relegitimate² itself. As will become apparent, the potential solutions to the state’s legitimacy crisis are disparate and wide-ranging, and some relegitimation choices even contradict others.

A central question underlying these chapters is: How can the state justify the “deservedness” of its exercise of criminal justice authority in its own eyes as well as in those of others? To arrive at an answer, it is necessary to engage with a preliminary issue, namely the extent to which non-state participation in crime-fighting truly threatens state legitimacy by undermining state claims to monopolise the use of force. States typically display an aversion to competition as regards the use of crime-fighting force.³ This could be because where the state police are seen as irrelevant, this perception may easily be extended to encompass the state itself: “people may perceive it as pointless to engage with a state that can’t even offer a basic service such as

¹ The conception of power or legitimacy as a “zero-sum game” implies that if one gains, another loses – i.e., vigilante acquisition of power would necessarily imply a corresponding loss of state power, and vice versa.

² It may be more accurate to refer to state *legitimation*, rather than state *relegitimation*, since it could be argued that a state such as South Africa was never truly legitimate, and thus is now in need of legitimation (from scratch) as opposed to *relegitimation* (which implies that the state was once legitimate, lost legitimacy and must now regain that lost legitimacy). While the persuasiveness of this argument is acknowledged, using the term “relegitimation” is a recognition that achieving state (re)legitimation is not a once-off, new event or “thing”, but is part of an ongoing, active process of achieving and maintaining legitimacy.

³ Abrahams *Vigilant Citizens* 76.

personal security as well as private initiatives can”.⁴ This points to a pressing normative legitimacy concern that confronts the state, namely whether “informal sector” involvement in the criminal justice sphere should inevitably be viewed a threat to the rule of law and state legitimacy.⁵

If it is correct to contend – as was argued in chapter 4 in particular – that vigilantism is at least to some extent a demonstration of state delegitimation stemming from lack of trust in the formal criminal justice system, it would follow that vigilante self-legitimation occurs at the expense of state legitimacy. Cohan goes so far as to say that “[w]hen a community so vehemently and desperately tries to achieve its objectives through lawlessness [vigilantism], the law becomes a symbol of incapacity, of failure.”⁶ Whether this “zero-sum” approach that assumes an inverse relationship between state and vigilante power is necessarily accurate in all instances is up for debate.⁷ However, the prevalence of such discourse underscores the need for the state to engage seriously with the issue of vigilantism. Not doing so could imply that the state condones the flouting of its moral authority, and would be tantamount to further empowering and legitimising vigilantes at the expense of its own legitimacy.⁸ In addition, turning a blind eye to vigilante excesses and human rights violations is a contravention of the state’s human-rights-based criminal justice mandate.⁹ Action is required – but what? This chapter is devoted to considering how the state can bolster its moral authority¹⁰ vis-à-vis those – including vigilantes – whose actions would seem to undermine it.

⁴ Baker *Lawless Law Enforcers in Africa* 170.

⁵ Abrahams *Vigilant Citizens* 76.

⁶ Cohan (2011) *Suffolk University Law Review* 871.

⁷ See §§ 6 2 3, 6 4 and 7 1 for more on the zero-sum game argument.

⁸ Nel (2014) *Acta Criminologica* 31.

⁹ See, for instance, the Nkomazi police station commander quoted in Jensen “Through the Lens of Crime: Land Claims and the Contestations of Citizenship on the Frontier of the South African State” in *The Security-Development Nexus: Expressions of Sovereignty and Securitization in Southern Africa* 205, who said of the vigilante group Khkula, “Sometimes you have to turn a blind eye for the sake of crime. If you for instance have someone coming in accused of raping a three-year-old, and he has been beaten up, then you do turn the blind eye. You know that is like victim support”. As will be elaborated on in § 7 3 2 below, this “cop-out”(!) approach is undesirable in the light of the state obligation to uphold and protect the human rights of all, including those accused of crimes.

¹⁰ Both to itself and to external audiences, such as vigilantes and the wider community.

The point of departure of this chapter is the “zero-sum” understanding of power relations: In that it calls into question the exclusivity and prestige of state crime-fighting power, vigilante empowerment is detrimental to state legitimacy. The chapter examines the state’s relegitimation response that is aimed at quelling or eliminating the undesirable conduct of those who seek to challenge its authority. The state strategies discussed here are therefore categorised as predominantly exclusionary, echoing the previous chapter’s discussion of counter-legitimation through violent elimination.¹¹ The state reaction to the non-law-abiding members of society is at the forefront, in that state approaches to fighting crime in general, in addition to the specific crime of vigilantism, are investigated.

The chapter commences by focusing on the state’s own self-legitimation attempts. As has become apparent, since vigilantism is frequently justified on the basis that vigilantes fill the “policing gap” left by non-existent or inadequate law enforcement, the state must reinforce its deficient normative legitimacy by clearly demonstrating and enhancing its law-and-order capabilities. This section explores state efforts to convince itself and others of the rightfulness of its crime-fighting power by addressing its own failings as regards provision of security and justice. Next, exclusionary state relegitimation tactics that have vigilantes as the target audience are considered. The emphasis is on how the state might delegitimize vigilantes by discrediting their ideologies and proscribing their conduct. The most suitable criminalisation options are also identified and elaborated on. It must be kept in mind, however, that even where the state’s primary strategy is exclusionary – to label its citizens as criminals – the core underlying assumption remains that none of its relegitimation approaches should undermine or contradict its self-legitimated identity as guarantor of human rights; rights that are guaranteed to perpetrators and targets of vigilantism alike.

¹¹ See from § 5.3.2 above.

6 2 Addressing the real, underlying causes of criminal justice delegitimation

In a quest for self-legitimation in the arena of criminal justice provision, and policing in particular, states and their criminal justice agents are constantly engaged in a war of words aimed at constructing an image of policing that portrays the police service “as the sole legitimate, effective, and accountable provider of nationwide policing” as compared to their poorly-trained, abusive, unaccountable and often illegal non-state counterparts.¹² If this self-identity accurately reflected reality in the sense that the criminal justice system was believed and experienced to be functioning effectively, such a demonstration of the state’s abilities would indeed undermine the most powerful rationale for vigilantism – that vigilantes take the law into their own hands as a desperate last resort – thereby weakening the foundation of vigilantes’ counter-legitimation substantially. In chapter 4, some of the main reasons why the state is perceived to be failing to carry out its law and order mandate were identified. The next section considers possible counter-measures that could be implemented to reverse this trend, thus contributing to state re-legitimation.

6 2 1 *Effective crime-fighting: achievable prospect or myth?*

How, then, to enhance the moral authority of the formal criminal justice system? *Prima facie*, the answer would seem to be: By implementing strategies aimed at addressing practical law-enforcement failings. Few would disagree with the sentiments underlying Minnaar’s critique of the criminal justice system or his proposed solutions for combating vigilantism:

“[T]he state needs to assert its authority, enforce its laws effectively and efficiently and put functioning systems of criminal justice and policing into those areas that need it most, namely the

¹² Baker *Security in Post-Conflict Africa* 46.

poorer urban neighbourhoods, informal settlements and deep rural areas”.¹³

He goes on to say:

“[T]he whole criminal justice system needs to be unclogged, speeded up, and corruption stamped out so that criminal cases can be dealt with quickly. The public needs to see justice happen to criminals caught and handed over to the authorities”.¹⁴

Laudable though these sentiments may be, it is submitted that focusing exclusively on eradicating the root causes of vigilantism is an ideal aspiration rather than a realistic solution.

First, although it is recognised that it is undoubtedly desirable – and may even be feasible – to improve aspects of the criminal justice system’s performance,¹⁵ individual states’ capacity to do so is severely limited by practical and resource constraints. Particularly in the developing world, where informal justice is most prevalent, budgetary limitations may result in even the best law-enforcement re-legitimation plans remaining unimplemented, or being only partially realised. Baker makes a good point when he observes that “extend[ing] and reform[ing] expensive state punitive justice systems that are available to very few ... makes little sense and is not a sustainable programme in terms of cost.”¹⁶ Perhaps the problem also lies with the nature of the formal criminal justice paradigm itself: Even if the state did manage to provide universal access to criminal justice, a state process that is inevitably lengthy, expensive and adversarial may be inappropriate and ill-suited to resolving disputes in a setting of poverty.¹⁷

¹³ Minnaar “The ‘New’ Vigilantism” in *Informal Criminal Justice* 130.

¹⁴ 130.

¹⁵ The Khayelitsha Commission recommendations in this regard include police providing target response times in relation to calls for assistance; giving regular feedback to complainants regarding dockets; providing visible policing patrols; attending and participating in all partnership meetings; and undertaking to “process all complaints made against SAPS members transparently, efficiently, thoroughly and fairly”, including providing full and regular feedback to complainants (O’Regan & Pikoli *Khayelitsha Commission Report* 440).

¹⁶ B Baker “‘He Must Buy What He Stole and Then We Forgive’: Restorative Justice in Rwanda and Sierra Leone” (2007) 1 *Acta Juridica* 171 191.

¹⁷ 191.

Second, the state may be justifiably reluctant to heed certain citizen demands, even if it is theoretically capable of doing so.¹⁸ Some might argue that the state should consider appeasing vigilantes and their supporters by expanding the categories of conduct subject to criminal punishment, removing the due process safeguards for certain accused persons or resorting to ever-harsher forms of punishment – and indeed, states sometimes succumb to public pressure in this regard.¹⁹ However, pandering to punitive sentiments, although a politically expedient, quick-fix solution, is unwise: it may risk threatening the rule of law, which forms the very foundation of the state’s moral authority and guarantees every citizen protection from state abuse of power.

Third, many of the factors giving rise to a violent and vigilante-prone society are matters concerning which the criminal justice system can do very little – poverty, marginalisation and inequality to name but three. Resolving issues such as these is certainly beyond the remit of the criminal justice system alone, since they stem largely from a lack of resources (or the unavoidably inefficient distribution of available resources). Such wider societal problems that lead to vigilantism can never permanently be eradicated at source – they “seem likely to be givens everywhere”.²⁰

Fourth, in the South African context state re-legitimation has to surmount the extra hurdle of the legacy of apartheid. The widespread suspicion of criminal justice authorities engendered by brutal and discriminatory apartheid-style policing has by no means yet been overcome.²¹

¹⁸ See from § 4.3 above.

¹⁹ E.g., by enacting minimum sentencing legislation such as ss 51(1) (3) of the Criminal Law Amendment Act 105 of 1997, which makes life imprisonment mandatory for certain prescribed offences, unless “substantial and compelling” circumstances exist. This fetters the previously-existing judicial discretion that allowed judges to impose a less harsh sentence in appropriate instances even where “substantial and compelling” circumstances were not present. See also the oft-amended s 49(2)(b) of the Criminal Procedure Act, the 2012 incarnation of which permits the use of lethal force while effecting the arrest of a fleeing suspect even where there is no immediate threat of serious bodily injury to the arrestor or any other person (also see discussion in Burchell *Principles* 156-158 and Snyman *Criminal Law* 132-133).

²⁰ Abrahams *Vigilant Citizens* 161.

²¹ See J Steinberg *Thin Blue: The Unwritten Rules of Policing in South Africa* (2008), who notes that the post-1994 government was misguided in its belief that urban South Africans have long ago given their consent to be policed, and uses gripping narrative examples to illustrate this point (see 98-99; also 114-115 for the attitude of township residents to police in the “old days”).

As outlined in the opening chapter, many communities were left to their own devices as regards policing, making informal policing the only feasible option for many decades. For this reason, Steinberg opines:

“To get South Africa to give its consent to being policed would require breaking down a generations-old architecture of security and protection. It would require bringing a body with unprecedented authority into township life, a body elevated above existing security markets and thus able to break their logic. A body without that authority would simply have to negotiate its way into existing markets, becoming yet another player among many.”²²

It is doubtful whether the beleaguered South African criminal justice system is indeed at present a body with the necessary authority to overcome community mistrust and a long-standing culture of self-sufficiency and self-help.

With this gloomy prognosis, it may rightly be asked what steps government actors can realistically take to enhance their own legitimacy and remove the justification for vigilantism, weighed down by the burden of scarcity of resources and historical mistrust as they are. Two modest, cost-effective and relatively simple-to-achieve interventions will now be outlined.

6 2 2 *Minimalist and minimal policing*

While many – including the police themselves – accept, albeit reluctantly, that the demand for security outstrips the capacity of the state to provide it,²³ this does not imply that the police need simply surrender their policing responsibilities to non-state actors such as vigilantes. The police have “symbolic power” and unique capacities that make citizens desire the

²² 98.

²³ M Marks, C Shearing & J Wood “Who Should the Police Be? Finding a New Narrative for Community Policing in South Africa” (2009) 10 (2) *Police Practice and Research* 145 146.

presence of the state in the policing arena,²⁴ even if the security-provision arena is shared with others. In this regard, Marks et al dispute the notion that formal policing in developing countries such as South Africa can be “the hub of all community/societal problem-solving that is linked to broad notions of security”.²⁵ They argue that recognising that alternative, non-state ways of social ordering do exist, and may in many instances be more appropriate than the cumbersome, inaccessible state machinery in resolving everyday security concerns,²⁶ may actually create the space for the police to “feel less pressured to respond to an ever-widening demand for their interventions”.²⁷

Marks et al propose that the best way for police to build legitimacy would be for there to be a “‘minimalist’ vision of public police”,²⁸ which entails police “demonstrat[ing] their effectiveness in their core function”²⁹ instead of spreading themselves too thinly across the entire security-provision arena. Marks and Wood similarly argue against the widening of the reach of the police through “generally poorly determined ‘community policing’ programmes or highly interventionist and even militaristic strategies”,³⁰ in favour of the police confining themselves to doing only what they are trained and resourced to do. According to Marks et al,³¹ the core function and primary role of the police should be to “intervene authoritatively to restore order, resolve conflict, control crowds, and curtail (rather than prevent) crime”. Marks and Wood submit that this *minimalist* approach to policing which allows police to be “real police”³² should go hand in hand with a *minimal* view of policing, which entails that police should intervene chiefly when their expertise and authority is requested by communities feeling threatened by crime: “the police [should] co-operate with and respond to the demands of the public, rather than vice versa”.³³ A minimalist and minimal police framework would allow police to

²⁴ Cooper-Knock & Owen (2015) *Theoretical Criminology* 361.

²⁵ Marks, et al. (2009) *Police Practice and Research* 151.

²⁶ See, e.g., Baker (2007) *Acta Juridica* 191.

²⁷ Marks, et al. (2009) *Police Practice and Research* 151.

²⁸ M Marks & J Wood “South African Policing at a Crossroads: The Case for a ‘Minimal’ and ‘Minimalist’ Public Police” (2010) 14 (3) *Theoretical Criminology* 311 321.

²⁹ Marks, et al. (2009) *Police Practice and Research* 151.

³⁰ Marks & Wood (2010) *Theoretical Criminology* 321.

³¹ Marks, et al. (2009) *Police Practice and Research* 151.

³² Marks & Wood (2010) *Theoretical Criminology* 322.

³³ 323.

enhance their legitimacy by demonstrating their *effectiveness* “as a public service agency with unique mandates, skills and resources” (minimalist policing) while also showing that they are *democratic* (concentrating on minimal policing that is initiated by community demands).

The approach of Marks and her colleagues outlined above has much to commend it. While implementing effective policing always has budgetary implications, abandoning the elusive ideal of monopolising public policing means that the state may save costs and utilise scarce crime-fighting resources optimally, since the peripheral everyday security concerns requiring problem-solving rather than the “big gun”³⁴ may be outsourced to non-state actors. As regards formally monitoring the activities of such non-state actors, Marks et al are of the view that the state should limit its role to ensuring and facilitating public safety and security by making certain that non-state actors adhere to publicly agreed-upon norms and that due process and justice are upheld.³⁵ The benefits and pitfalls of co-opting vigilantes as non-state security partners are discussed further in chapter 7 below. Before considering potential strategies to include vigilantes in state policing efforts, however, it is necessary to deal with how best to approach the deep-seated lack of trust between criminal justice authorities and citizens, since resolving this issue may go a long way towards achieving state re-legitimation as regards the performance of its core policing functions.

6 2 3 *Enhancing procedural justice and perceptions of legitimacy*

As was expanded on in chapter 3, people do not only defer to state authority because they anticipate reward or fear punishment: research indicates that the perceived legitimacy of the criminal justice system activates self-regulatory mechanisms, making citizens more willing to defer voluntarily to, and co-operate with, legal authorities because they believe it is the right

³⁴ 322.

³⁵ Marks, et al. (2009) *Police Practice and Research* 152. This aspect is considered further at § 7 3 3 below.

and proper thing to do.³⁶ This internal sense of obligation to defer to state directives and rules is a key determinant of citizen assessments of state legitimacy, and its presence allows authorities to gain active co-operation from the public without needing to resort to (costly) coercive measures to enforce obedience.³⁷

Most significantly for present purposes, positive judgments regarding police legitimacy appear to have implications not only for citizen willingness to defer to state authority (obedience) but also for the likelihood of citizens being prepared to resort to violent self-help. Evidence shows that there is a link between whether state authorities are able to secure a normative monopoly on rightful force in the eyes of citizens and citizen perceptions of state legitimacy. Jackson et al's study among young male ethnic minority Londoners confirms that positive legitimacy judgments appear to have a "crowding out" effect on positive attitudes to private use of violence, with there being less acceptance of private violence if police are felt to be legitimate.³⁸ Conversely, the less legitimate the police are perceived to be, the more likely it is that citizens will tolerate use of private violence – including vigilantism³⁹ – and regard it as being justified.⁴⁰ Jackson et al were at pains to emphasise, however, that while there is possibly "something of a zero-sum relationship between approval of state violence and approval of non-state violence",⁴¹ this does not necessarily imply that there is a causal nexus – as opposed merely to a correlation – between legitimacy judgments and attitudes towards private violence: further research is required to tease out the precise nature of the connection.

Now that the existence of an empirical basis for linking high levels of perceived state legitimacy with citizen co-operation, deference, trust and reduced proneness to vigilantism has been reiterated, some practical ways in

³⁶ See, for instance, Tyler, et al. "Legitimacy and Criminal Justice: International Perspectives" in *Legitimacy and Criminal Justice: International Perspectives* 10-11.

³⁷ 10-11; 15; 27.

³⁸ Jackson, et al. (2013) *Psychology, Public Policy, and Law* 490.

³⁹ Jackson et al define private violence as including violence outside formal state channels as a means of social control – i.e., as a substitute for the police – which seems to encompass vigilantism.

⁴⁰ Jackson, et al. (2013) *Psychology, Public Policy, and Law* 479-480; 490-491.

⁴¹ 490-491.

which the state may apply these insights in formulating and implementing a policing strategy and agenda to enhance its legitimacy whilst minimising the risk of vigilantism will be outlined. In the previous section, the myth of attaining certainty of state punishment for rule-breaking was debunked: a developing state such as South Africa simply lacks the resources to motivate compliance with the law effectively via the application of sanctions. Indeed, even if the state could ensure that deserved punishment were imposed on each and every wrongdoer, relying on this instrumental and punitive model alone has disadvantages beyond the financial. A punitive orientation results in an increase in prison populations, which already consist disproportionately of the (vigilante-prone) poor and marginalised.⁴² It also tends to lead to a counterproductive and hostile relationship between citizens and criminal justice authorities.⁴³ Jackson et al's study linking lack of legitimacy with a likelihood to resort to private violence recommends that in situations of policing social unrest in marginalised communities, police would be well advised not to adopt aggressive or punitive policing styles. Rather, they should "develop a more consensual way of policing ... that seeks to generate and maintain police legitimacy", focusing on policing methods that prioritise the generation of mutual trust and a sense of shared aims. The primary objective of policing should be to give as many citizens as possible an active stake in the – presumably state-sanctioned – (re)production of social order.⁴⁴ Therefore, if it can be concluded that a purely sanction-based approach to motivating obedience to the law is at best unattainable and at worst undesirable, the state needs to explore other options that are more cost-effective and have the potential to produce better results both in terms of citizen compliance and trust and in enhanced state legitimacy.

⁴² This may be because poverty precludes people from access to justice such as adequate legal representation, or it may be more to do with the insidious effects what is sometimes termed the criminalisation of poverty. For more on the idea of criminalising poverty and race, see M Schuberth "Challenging the Weak States Hypothesis: Vigilantism in South Africa and Brazil" (2013) (20) *Journal of Peace, Conflict and Development* 38, who argues that in the context of "polarization and marginalization, the construction of an intrinsic connection between poverty, crime and violence leads to the stigmatization of the poor as criminals". See also Bénit-Gbaffou (2008) *Journal of Southern African Studies* 105, who is of the view that the criminalisation of poverty is used as a tool to demonstrate and enforce the separation and social distinction between rich and poor.

⁴³ Tyler (2006) *Journal of Social Issues* 308.

⁴⁴ Jackson, et al. (2013) *Psychology, Public Policy, and Law* 491.

The most promising alternative for achieving such consensual policing is what Tyler terms a “process-based model of regulation”, where the emphasis is on motivating compliance and co-operation due to an experience that the criminal justice system and its authorities are acting justly instead of on threat of sanction.⁴⁵ As already explained, for an approach focusing on procedural justice the mechanisms postulated as resulting in obedience to the law are the internal motivations of responsibility and obligation to authorities (i.e., legitimacy) engendered by fair procedures.⁴⁶ The idea of getting citizens to become more self-regulating in this potentially positive sense⁴⁷ is an attractive one. Encouraging the police and other criminal justice agents to endorse constitutional values such as respect for individual human dignity, accountability, openness and responsiveness not only expressly reiterates the state’s self-legitimated identity as guarantor of human rights, but also does so in a way that is comparatively affordable. What is required is not harsher punishment, more expensive crime-detecting apparatus or even necessarily additional manpower, but rather a conscious effort to educate all criminal justice agents regarding the need to prioritise the values of procedural justice actively in their day-to-day interactions with the public. Assuming there is the necessary political will to implement it, fostering a practice of good policing – by actively sensitising police to behave in accordance with their human rights mandate when engaging with the public – could be a sustainable and financially viable objective, and would reap significant rewards in terms of enhanced state legitimacy.

The benefits of employing a procedural justice model of policing are acknowledged in the Khayelitsha Commission report, where it is noted that utilising a procedural justice model has the capacity to create what it terms a virtuous – as opposed to vicious – circle:

⁴⁵ Tyler (2006) *Journal of Social Issues* 309.

⁴⁶ See also Tyler (2006) *Journal of Social Issues* 316.

⁴⁷ As opposed to Foucault’s “responsibilisation” sense. As Brown *Undoing the Demos* 133 observes, “[W]hen the act of being responsible is linguistically converted into the administered condition of being *responsibilized*, it departs from the domain of agency and instead governs the subject through an external moral injunction – through demands emanating from an invisible elsewhere”. She continues by saying that responsibilisation “signals a *regime* in which the singular human capacity for responsibility is deployed to constitute and govern subjects and through which their conduct is organized and measured, remaking and reorientating them for a neoliberal order.”

“If police treat people fairly and respectfully, and consistently with constitutional values and *ubuntu*, the police themselves will be respected, and this cycle of respect will promote a sense of social inclusivity and respect for the law.”⁴⁸

Furthermore, the Commission’s recommendations emphasise the importance of implementing such a policy across the board in order for the police to build better relationships with the community:

“[E]ach interaction between a SAPS member and a civilian has the capacity to foster or undermine the relations between SAPS and the community. Each interaction communicates to the civilian how SAPS values him or her – as a person worthy of equal respect, or not.”⁴⁹

Significantly, the Commission linked the values upon which the (Western) procedural justice model is based with the (African) principle of *ubuntu*. The saying “*umuntu ngumuntu ngabantu*”, meaning “a person is a person through other people”, encapsulates the idea of people being defined in terms of their relationships with others. According to Langa J in *S v Makwanyane*, the *ubuntu* paradigm:

“places ... emphasis on the communality and on the interdependence of the members of a community. *It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of.* It also entails the converse, however. The person has the corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all”.⁵⁰

⁴⁸ O’Regan & Pikoli *Khayelitsha Commission Report* 442.

⁴⁹ 441.

⁵⁰ *S v Makwanyane* para 223-224 (emphasis added).

The Commission's coupling of the seemingly alien procedural justice policing model with the long-entrenched and familiar justice paradigm of *ubuntu* points to the insight that it is possible for certain traditional African values to co-exist harmoniously with liberal human rights in the criminal justice sphere. For a state determined not to alienate its citizens while still aspiring to retain its identity as upholder of human rights, this demonstrates that custom and human rights are not necessarily at odds. It may be possible – and could indeed be imperative – for the state to harness the best of both traditional and procedural justice in its quest for successful relegitimation. The centrality of the underlying premise of *ubuntu* in a restorative justice paradigm is further explored below at §§ 7 5 2 and 7 5 3.

6 3 Relegitimation through exclusion: targeting vigilantes

Now that state efforts to enhance its identity as both security provider and upholder of human rights have been considered, focus shifts to an alternative relegitimation strategy, namely state attempts to undermine the legitimacy of vigilantism by discrediting vigilantes and repressing their conduct. In societies where vigilantism is ubiquitous, vigilante violence is a symptom of a widespread disregard for the law that is sustained by a perceived “message of impunity”,⁵¹ where the state appears not to challenge vigilantes’ claim to “law-enforcement” power, it is easier for communities to “accept ... vigilantism as legitimate and congruent”.⁵² To counteract vigilantism’s “latent popularity” the state needs to send a powerful message, both to society at large and to those prone to vigilantism in particular, that it will not tolerate self-help.⁵³

This section highlights a two-pronged approach that the state could follow in attempting to restore its legitimacy through vigilante exclusion. The state’s first option is to win the hearts-and-minds struggle against vigilantes for local community support; its second is to utilise the criminal sanction to

⁵¹ Harris *As for Violent Crime That's Our Daily Bread* 42.

⁵² Silke (2001) *The Police Journal* 129.

⁵³ 131; Harris *As for Violent Crime That's Our Daily Bread*.

condemn vigilantism. In relation to the first approach, the state might choose to break down vigilantes' aura of impunity and integrity by waging a war of words aimed at exposing vigilante weaknesses and failures. By concentrating on the human rights abuses vigilantes perpetrate in the name of protecting the community, the state might be able depict itself as more deserving of legitimation in comparison. As regards the second approach, the state could achieve legitimation through exclusion by treating vigilantism as a crime – preferably separately criminalised – and devising community-based restorative penalties for it. The best strategy would be for the state to take seriously vigilantes' status as criminals, whilst simultaneously acknowledging vigilantism's status as a “moralistic” crime with social causes beyond vigilantes' control that decrease the reprehensibility of their conduct considerably. The state's relegitimation prospects could thus be enhanced by prosecuting vigilantes for what they do, but still exhibiting sensitivity to community sentiment regarding vigilantes' comparatively lower blameworthiness level vis-à-vis “ordinary” criminals. Of course, neither approach is foolproof nor without its drawbacks, but both are worth attempting, if only because their focus is on showing the state to be a champion of human rights. Both alternatives are considered below.

6 3 1 “Devalourising” the symbolic power of vigilantes⁵⁴

In communities where vigilantism has entrenched itself, effectively usurping some of the official criminal justice system's power and authority, relegitimation requires the state to find ways to undermine community members' identification with vigilantes.⁵⁵ It may be aided in its efforts to address the “thorny question of popular support for vigilantism”⁵⁶ by the ambivalent response that vigilantism generally evokes; even those who view vigilantism as the only available crime-fighting option tend to be willing to acknowledge that it is a flawed alternative.⁵⁷ Despite the perceived popularity

⁵⁴ Harris *As for Violent Crime That's Our Daily Bread* 54.

⁵⁵ Silke (2001) *The Police Journal* 130-131.

⁵⁶ 130.

⁵⁷ Baker *Security in Post-Conflict Africa* 62.

of vigilantism, 73.3% of respondents to the Mthente survey in Khayelitsha, when questioned about whether vigilantism is ever a justified response to crime, were of the view that it is not justified.⁵⁸ In light of this finding that, even in a vigilante-prone community with high levels of police inefficiency, vigilantism was by no means universally condoned, there is clearly scope for the state to deconstruct vigilante legitimization ideologies and draw attention to its problematic methods of “administering justice”. This may serve to delegitimize vigilantes’ crime-fighting power and make the state’s criminal justice efforts seem more legitimate in comparison. However, Silke⁵⁹ warns that attempts to alienate vigilantes from the wider community in this way should be done in a circumspect manner. If allegations concerning vigilante wrongdoings are less than truthful and accurate, such a smear campaign could backfire and risk fostering more support for the seemingly persecuted and hard-done-by vigilantes within their immediate communities.

6 3 1 1 *Deconstructing/discrediting vigilante ideologies*

As regards vigilante ideologies, the key myth that the state needs to deconstruct is the conception of vigilante violence as “noble and altruistic and something to be supported”.⁶⁰ This may be achieved by drawing attention to vigilantes’ personal inadequacies and failings. Identifying and publicising instances where ostensible crime-fighting or community protection is merely a cover-up for serious crimes committed for personal gain may convincingly demonstrate that vigilantes are merely exploiting the vigilante rhetoric that they act as crime-fighters on behalf of the community to commit private “pure crime”.⁶¹ This argument is especially compelling in discrediting vigilante groups that request payment for services, since a profit motive is a clear indication that their conduct is driven by personal benefit rather than community well-being.⁶²

⁵⁸ O’Regan & Pikoli *Khayelitsha Commission Report* 133.

⁵⁹ Silke (2001) *The Police Journal* 131.

⁶⁰ Harris *As for Violent Crime That’s Our Daily Bread* 41.

⁶¹ 46.

⁶² See 46.

In addition, the state may portray vigilantism as a self-motivated act of revenge,⁶³ fuelled by emotions of violent anger and a desire to retaliate rather than to do justice in the collective interest. This image of the bloodthirsty and vengeful mob undermines the vigilante depiction of their violent conduct as a “morally painful but necessary business”, carried out as a last resort “with deep sorrow”.⁶⁴

Another unsavoury aspect of South African vigilante ideology that the state could highlight relates to the fact that vigilantism “perpetuates a dominant and staunchly traditional, patriarchal community structure, one that draws strength from conservative notions of gender, ethnicity and primacy of age.”⁶⁵ Martin observes that vigilantism employed to suppress poor and marginalised groups – particularly indigent male youth, but also women and foreigners – has developed into a “highly troubling and systematically reproduced trend”.⁶⁶ By pointing out the part played by vigilantes in keeping in place an “iniquitous system” that entrenches the interests of older, wealthier men at the expense of other community members, the state could discredit the vigilante claim to be addressing the needs of the whole (law-abiding) community, rather than merely sections of it. Revealing the vigilante agenda as being reliant on the discourse of cleansing society of a sub-class⁶⁷ identified as undesirable for reasons other than immediate personal deviance exposes the role played by vigilantism in reproducing and exacerbating social inequality, and could well weaken support for vigilantes within the community on that basis.

⁶³ This strategy is employed in the Khayelitsha Commission report in that the commissioners plump for the term “vengeance attack” to describe vigilantism, as opposed to using more neutral and less emotive terminology, thus (it is submitted) implicitly demonstrating their disapproval of informal justice.

⁶⁴ Burrows *Vigilante!* 13.

⁶⁵ Martin (2010) *Acta Criminologica* 66. See also Oomen (2004) *African Studies*; Buur & Jensen (2004) *African Studies* and Buur (2008) *Review of African Political Economy*.

⁶⁶ Martin (2010) *Acta Criminologica* 54.

⁶⁷ Baker (2002) *Journal of Modern African Studies* 49.

6.3.1.2 *Emphasising negative aspects of vigilante practices vis-à-vis the benefits of formalism*

To relegitimize itself, the state needs not only to discredit the myths and ideologies of vigilantism, but also to find ways of emphasising the advantages of formal in contrast to informal justice. As noted in chapters 4 and 5, informalism has various strengths that vigilantes rely on to gain community support. Attractive characteristics of vigilantism and other types of informal justice include accessibility, intelligibility, affordability and effectiveness.⁶⁸ However, these same qualities that allow vigilantes to provide efficacious, speedy, understandable and often permanent solutions to problems of social order make vigilantism a style of “justice” that lacks the safeguards necessary to make it “just”. This was recognised by focus group participants in the Mthente survey who, when asked for reasons why they regarded vigilantism as unjustified, explained that vigilante groups “never have enough evidence”, “never conduct thorough investigations” and are themselves “committing a crime”.⁶⁹ Other witnesses testifying before the Khayelitsha Commission pointed to the disproportionality between crime and punishment, and several times suggested that “the victim of the vengeance attack was not the person who had actually committed the crime that had triggered the attack”.⁷⁰ The link between vigilante “justice” and the infringement of constitutional rights will now briefly be explained.

Section 35(1) of the Constitution guarantees those who have been arrested for allegedly committing a crime the right to remain silent,⁷¹ to be informed promptly of this right⁷² and the consequences for not exercising it,⁷³ as well as the right not to be compelled to make an admission or confession that could be used in evidence against them.⁷⁴ Since vigilantes routinely resort to torture to obtain confessions, they plainly do not uphold these rights. At the trial stage, the fair trial rights afforded the accused in section 35(3)

⁶⁸ See also Baker *Security in Post-Conflict Africa* 39-42 for more details.

⁶⁹ O'Regan & Pikoli *Khayelitsha Commission Report* 133.

⁷⁰ 387-388.

⁷¹ Constitution of the Republic of South Africa, 1996 s 35(1)(a).

⁷² S 35(1)(b)(i).

⁷³ S 35(1)(b)(ii).

⁷⁴ S 35(1)(c).

include the right to be informed of the charge in sufficient detail to be able to answer it;⁷⁵ to have time and resources to prepare a defence;⁷⁶ to be tried publicly before an ordinary court;⁷⁷ to be present at trial⁷⁸ and to be tried “without unreasonable delay”;⁷⁹ to choose to have legal representation and to be informed of this right;⁸⁰ to “be presumed innocent, to remain silent, and not to testify during the proceedings”;⁸¹ to adduce and challenge evidence,⁸² but not to be compelled to give self-incriminating evidence;⁸³ and not to be convicted for committing conduct that is not criminalised under law.⁸⁴ Assuming that most acts of vigilantism combine the arrest and trial stages, vigilante victims are usually “tried” publicly and speedily, and the “trial” takes place in their presence. However, the other fair trial rights mentioned are routinely violated. The spontaneous and instantaneous vigilante criminal justice “process” circumvents the safeguarding of an accused’s right to prepare a defence, to obtain legal representation, to bring or dispute evidence and depending on the circumstances, also their right to be informed of the charge against them. The “trial” is not carried out in an independent and impartial⁸⁵ setting, which is contrary to the right to be tried by an “ordinary court”. As was mentioned above, torture is frequently used to compel confessions, which also negates the right to remain silent. While much vigilantism may be carried out against persons suspected of committing recognised offences, social control vigilantism violates the right to be convicted only of conduct that is recognised by law as an offence, and simultaneously undermines the principle of legality.⁸⁶ Without the safeguards provided for in section 35, the likelihood of innocent persons being targeted for vigilante punishment increases exponentially. All in all, it is clear that vigilantes view the presumption of innocence, due process guarantees and

⁷⁵ S 35(3)(a).

⁷⁶ S 35(3)(b).

⁷⁷ S 35(3)(c).

⁷⁸ S 35(3)(e).

⁷⁹ S 35 (3)(d).

⁸⁰ S 35(3)(f) and (g).

⁸¹ S 35(3)(h).

⁸² S 35(3)(i).

⁸³ S 35(3)(j).

⁸⁴ S 35(3)(l).

⁸⁵ Minnaar “The ‘New’ Vigilantism” in *Informal Criminal Justice* 130.

⁸⁶ The relevant principle is that of *nullum crimen sine lege* (no crime without a law) (Snyman *Criminal Law* 34).

the rule of law as “more of an obstacle to maintaining social order than ... an effective guarantee of it”.⁸⁷

In addition, vigilante violence violates numerous other constitutional rights of its victims. The right to equality is undermined in various respects. As mentioned above,⁸⁸ vigilantes tend to target certain categories of person for punishment, particularly young men, in a manner that discriminates against them based on their age and sex.⁸⁹ Vigilante victims are also treated unequally in the sense that they are not afforded any formal due process protections, which distinguishes their position from those who are subject to the formal trial and punishment process. Unlike state criminal justice authorities, vigilantes cannot be held accountable, since there is no opportunity for an appeal whereby their victims could challenge the imposition of a sanction on the basis of rules that would be applied equally to others.⁹⁰ The right of vigilante victims to human dignity⁹¹ is definitely at issue too. The punishments imposed by vigilantes violate their victims’ inherent humanity. Even where victims are not killed, the public nature of their punishment can lead to ostracising or shunning,⁹² or they may be completely expelled from the community.⁹³ These actions express the perpetrators’ intolerance in a manner that is clearly not in line with the constitutional obligation to respect and protect human dignity. Vigilantes also violate the right to life⁹⁴ all too often. They frequently impose “death sentences” that are grossly disproportionate to the perceived wrongdoing⁹⁵ of their victims, and that are carried out in ways that further dehumanise them.⁹⁶ The right to freedom and security of the person is severely compromised by acts of vigilantism as well. Section 12(1) of the Constitution guarantees the right, *inter alia*, not to be

⁸⁷ Baker (2002) *Journal of Modern African Studies* 51.

⁸⁸ See §§ 4 3 1 1 and 5 3 2 1.

⁸⁹ Constitution of the Republic of South Africa, 1996 s 9(4).

⁹⁰ C Harvey “Legality, Legitimacy and the Politics of Informalism” in D Feenan (eds) *Informal Criminal Justice* (2003) 22.

⁹¹ Constitution of the Republic of South Africa, 1996 s 10.

⁹² Minnaar “The ‘New’ Vigilantism” in *Informal Criminal Justice* 130.

⁹³ Resulting in the “social death” referred to by Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 204 and discussed in § 5 3 2 3 above.

⁹⁴ Constitution of the Republic of South Africa, 1996 s 11.

⁹⁵ Killing suspected housebreakers is a pervasive vigilante practice.

⁹⁶ E.g., stoning, sjambokking or “necklacing”.

deprived of freedom arbitrarily or without just cause;⁹⁷ not to be detained without trial;⁹⁸ to be “free from all forms of violence from either public *or private* sources”;⁹⁹ and not to be tortured¹⁰⁰ or subjected to cruel, inhuman or degrading treatment or punishment.¹⁰¹ It need scarcely be pointed out that the violation of one or more of these rights of vigilante victims is commonplace. Vigilantes who carry out unauthorised searches of the dwellings or possessions of those they identify as suspects under the guise of evidence-gathering also fall foul of section 14 of the Constitution, which guarantees the right to privacy, specifically including the right not to have one’s person, home¹⁰² or property¹⁰³ searched or one’s possessions seized.¹⁰⁴

Regarding the question of whether any of the rights-limitations identified above is capable of being viewed as “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”, as provided for in section 36(1) of the Constitution, it is submitted that the answer must be no. The import of the rights at stake,¹⁰⁵ coupled with the nature and extent¹⁰⁶ of rights violations and the fact that there are indeed “less restrictive”¹⁰⁷ means to ensure community safety and security, makes the vigilante infringement of human rights constitutionally indefensible.

Armed with this knowledge, the state may demonstrate convincingly that vigilantism should not be viewed as a speedy and effective form of justice, but instead as a serious and persistent form of human rights abuse. The state may well be able to impress on vigilante supporters that those whose cause they champion are not crime-fighting heroes, but criminals in their own right. In a global society that is becoming ever more attuned to the significance of human rights and the need to be seen to be abiding by a

⁹⁷ Constitution of the Republic of South Africa, 1996 s 12(1)(a).

⁹⁸ S 12(1)(b).

⁹⁹ S 12(1)(c) (emphasis added).

¹⁰⁰ S 12(1)(d).

¹⁰¹ S 12(1)(e).

¹⁰² S 14(a).

¹⁰³ S 14(b).

¹⁰⁴ S 14(c).

¹⁰⁵ S 36(1)(a) – they include life and human dignity, after all.

¹⁰⁶ S 36(1)(c).

¹⁰⁷ S 36(1)(e).

human rights ethos, this may go some way towards “devalourising” vigilantes’ power and legitimacy in the eyes of the community. The issue of educating citizens regarding the benefits of due process and respect for human rights, and the need to portray human rights for all as more than merely an unnecessary hurdle to achieving justice, is discussed further in § 7 6 1 below.

6 3 2 Criminalisation of vigilantism

As already stated, the rationale for prosecuting and convicting perpetrators of vigilantism as a form of crime is that vigilantism is an overt manifestation of state weakness – a symptom of complete disregard for the law – and the state must act decisively to counteract the perception that vigilantes operate with impunity. The state may deem it necessary to thwart the symbolic power that vigilantes wield by – often quite literally – getting away with murder¹⁰⁸ by severely punishing vigilantes. In coming down hard on vigilantes the state may “reactivate [its own] myth of sovereignty”¹⁰⁹ by publicly demonstrating its own power to potential supporters and opponents alike. In so doing, the state may not only symbolically reassert its claim to the exclusive exercise of coercive force but also expressly brand vigilantes as “enemies” by stigmatising them as criminals, availing itself of the formal criminal justice system to suppress and punish vigilantism swiftly.¹¹⁰

An approach that focuses on treating vigilantism as a crime appears to have the support of the Khayelitsha Commission. Its report criticises SAPS for appearing “somewhat ambivalent” towards vigilantism and for lacking a specific strategy to address the problem of vigilantism or vengeance attacks.¹¹¹ The report recommends (*inter alia*) that all instances of vengeance attacks and killings be recorded and reported at SAPS Cluster Crime Combating Forum meetings, and that the Cluster Detective Coordinator

¹⁰⁸ Harris *As for Violent Crime That’s Our Daily Bread* 41.

¹⁰⁹ D Garland “The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society” (1996) 36 (4) *British Journal of Criminology* 445 460.

¹¹⁰ See Harris *As for Violent Crime That’s Our Daily Bread* 41; Minnaar “The ‘New’ Vigilantism” in *Informal Criminal Justice* 129-130; Bidaguren & Nina (2004) *Social Justice* 165; 177.

¹¹¹ O’Regan & Pikoli *Khayelitsha Commission Report* 388.

institute an “intelligence-based approach to vengeance attacks and killings”.¹¹² A last suggestion of the report is that a specific policing strategy be developed to deal with vengeance attacks, which should include provision for rescuing victims, arresting perpetrators and securing crime scenes.¹¹³ However, as will become apparent in the next section, the state faces considerable challenges in attempting to deal authoritatively with vigilantes.

6 3 2 1 *The challenge of tackling the mob*

“When arriving at these scenes you usually almost catch the people in action, but with the arrival of marked vehicles they disappear into the structures. Witnesses don’t want to identify anyone. It’s like it’s being committed by ghosts. So no one wants to step forward and say I can identify [the perpetrators]. There are just no witnesses, no one saw anything.”

— Khayelitsha Station Commander Colonel Nel, quoted in O’Regan and Pikoli *Khayelitsha Commission Report* 232.

Successfully implementing a get-tough strategy with respect to vigilantism is easier said than done. As Wisler and Onwudiwe rightly note, “[a]lthough the rhetoric of ‘criminalizing’ informal policing can serve the long-term normative goals and enterprise of state builders, they [sic] might not correspond to the reality of policing in an incomplete and weak state.”¹¹⁴ Indeed, the Khayelitsha Commission report readily acknowledged that “bringing an end to such attacks is not something that SAPS will be able to do quickly or on its own”.¹¹⁵ There are a variety of reasons why prosecuting instances of mob-led informal punishment poses difficulties for the state.

¹¹² 456.

¹¹³ 456.

¹¹⁴ Wisler & Onwudiwe (2008) *Police Quarterly* 429.

¹¹⁵ O’Regan & Pikoli *Khayelitsha Commission Report* 388.

Some of the factors sustaining vigilante activity by impeding its prosecution have been mentioned in previous chapters. There is the “conspiracy of silence” that was discussed in § 5 4 1 1 in the context of the terror-inducing nature of vigilante violence. The general lack of co-operation from witnesses¹¹⁶ living in the vicinity of vigilante incidents is a notable feature of vigilantism – so significant, indeed, that Swanepoel and Duvenhage identify it as one of vigilantism’s defining characteristics.¹¹⁷ The reluctance to testify may be because those who identify perpetrators of vigilantism fear being labelled as informers, which might put them at risk of violent attack themselves.¹¹⁸ Witness intimidation is a distinct possibility in close-knit communities where witness anonymity cannot be guaranteed: fear and what Minnaar terms “sheer crowd apathy”¹¹⁹ coupled with fear may cause community members to falsely deny witnessing an act of vigilantism in order to avoid involvement. It may also be hard in practice to distinguish between mere bystanders and those who are themselves involved in the act of vigilantism¹²⁰ – it may well be that those whom the police question as witnesses are in fact perpetrators, and would be unwilling to assist police for this reason. Those who support or condone the actions of vigilantes, even if they are not directly involved, may likewise refuse to come forward or to testify. Their high levels of frustration (or open anger)¹²¹ about the havoc wreaked by crime in their communities may have caused them to support and legitimise vigilante crime-fighting initiatives, and they would therefore have no incentive to help authorities to prosecute vigilantes. In *S v Dikqacwi*, Binns-Ward J opines:

“Denial and cover-up appear ... to be an integral characteristic of the culture of vigilantism. This is evidenced by the refusal or inability of affected communities to treat it as an evil rather than a good, and the consequent lack of co-operation with which the

¹¹⁶ Martin (2012) *State Crime* 230.

¹¹⁷ Swanepoel & Duvenhage (2007) *Acta Academia* 126-127.

¹¹⁸ Minnaar “The ‘New’ Vigilantism” in *Informal Criminal Justice* 120.

¹¹⁹ 120.

¹²⁰ Martin (2012) *State Crime* 230. For more on the grey area between witnesses and perpetrators in the context of joint criminal enterprises, see § 6 3 2 2 below.

¹²¹ Minnaar “The ‘New’ Vigilantism” in *Informal Criminal Justice* 120.

police and the courts have to deal in cases in which it is a feature.”¹²²

In addition, an over-harsh and punitive strategy against vigilantes may easily breed citizen resentment.¹²³ If the state is perceived to be squandering scarce resources on opposing popularly-backed “crime-fighters” rather than “genuine” criminals, community members would not want to come forward to assist the police.

Even if all these hurdles are overcome and vigilante suspects are arrested, the state is frequently still faced with the “procedural nightmare”¹²⁴ of charging tens – even hundreds – of people with a crime. As Abel correctly notes, “[c]riminal law is ill-suited to repress mass action”.¹²⁵ The issue of the crime(s) with which vigilantes may be charged, and how such prosecution is to be accomplished, is the topic of the next section.

6 3 2 2 *Common purpose liability and other problematic issues*

There is a wide range of criminal prohibitions in terms of which vigilantes’ conduct may be penalised.¹²⁶ Depending on the nature of the incident, the charge could be murder, assault, arson, malicious damage to property, public violence or defeating the course of justice, or related competent verdicts such as liability as an accomplice, attempt liability, conspiracy and incitement. Whatever the specific charge, the state often faces the difficulty of having to prosecute vigilantes *en masse*.¹²⁷

¹²² *S v Dikqacwi and others* para 29.

¹²³ See also para 7, quoted in § 6 3 2 3, where Binns-Ward J refers to the fact that imposing harsh punishments on vigilantes may well alienate community members still more, since lengthy prison sentences may well be viewed as “indications of the system being harsh on those who they see as the ones trying to do something effective about crime while it is otherwise soft on crime, or ineffective about it”.

¹²⁴ Martin (2012) *State Crime* 230.

¹²⁵ Abel *Politics by Other Means: Law in the Struggle Against Apartheid* 373.

¹²⁶ See § 2 4 2 above for more details.

¹²⁷ Although lone vigilantes are by no means unheard of, this section addresses the legal implications of acts of collective or group vigilantism.

Successful prosecution of participants in acts of mob justice poses a significant challenge for the state, especially when charging individual participants with a consequence crime such as murder. The general rule is that the state needs to prove a causal link between the conduct of the accused and the unlawful consequence (i.e., death) before criminal liability can ensue. This entails asking, first, whether, but for the accused's conduct, the unlawful consequence would have occurred (the *conditio sine qua non* or "but for" test).¹²⁸ If the answer is no, factual causation has been established. The second step is to ascertain whether it is reasonable and fair, on legal policy grounds, to hold the accused liable for factually causing the consequence, usually by means of establishing whether there is a sufficiently close connection between the accused's conduct and the ensuing unlawful consequence.¹²⁹ Only once both factual and legal causation have been proven (and assuming the other liability requirements of unlawful conduct and fault are also present) is there the possibility of conviction.

Causation is particularly hard to prove in instances of joint murder such as an incident of mob justice: if a group of individuals acting together kills a vigilante victim, there may be no doubt that one or more of the group was responsible for the death, but it may be very tricky to ascertain – let alone prove beyond reasonable doubt – which one or more of the group was in fact the cause of death. To illustrate this practical and legal difficulty, Snyman uses the (typically vigilante) example of a group of twenty people who decide to kill someone by stoning him to death, and succeed in killing him by each throwing a stone at him. The usual test for factual causation may be applied to the scenario by asking: "But for the act of any particular member of the group, would the victim nevertheless have died?" The answer is self-evidently

¹²⁸ This test therefore involves a hypothetical elimination of the accused's conduct to see if the unlawful consequence would have disappeared or not. Decisions approving of the application of the *conditio sine qua non* test for legal causation include *Minister of Police v Skosana* 1977 1 SA 31 (A) 34F-G; *S v Daniëls en 'n ander* 1983 3 SA 275 (A) 324G-H (Trengove JA) and 331B (Jansen JA); *S v Tembani* 2007 1 SACR 355 (A) para 10; *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) paras 39-40 and 48.

¹²⁹ Tests for determining whether there is a sufficiently close connection to establish legal causation (*S v Mokgethi en andere* 1990 1 SA 32 (A) 45G-H) include the proximate cause test (which has been subject to much criticism, and its application rejected on the facts of *S v Daniëls en 'n ander* by Jansen JA at 332-333); the adequate cause test (applied in *S v Daniëls en 'n ander* by Jansen AJ at 331-332); and the *novus actus interveniens* test (applied in *S v Daniëls en 'n ander* by Trengove JA at 325).

yes, since the conduct of the other group members would have been sufficient to cause the victim's death, even if the participation of any one member of the group is "thought away".¹³⁰ The same reasoning would apply in respect of all the other group members too. The inevitable conclusion, ridiculous as it may seem, is that all group members ought to escape liability on the basis that there is no decisive factual link between their conduct and the death.

It is in precisely this type of scenario that the so-called common purpose doctrine is applicable. In terms of the common purpose doctrine, where it is proven that two or more people have agreed to commit a crime¹³¹ or where they actively associate¹³² in a joint criminal enterprise, each member will be responsible for specific criminal conduct committed by any of their number in execution of that purpose.¹³³ Provided they all agree to commit the particular crime beforehand (or alternatively actively associate themselves with its commission), and they act with the requisite fault (*mens rea*), no proof beyond reasonable doubt is required that each participant contributed causally to the ultimate unlawful consequence.¹³⁴ In effect, the conduct of whichever participant actually caused the consequence is imputed to all the other participants. Thus the common purpose doctrine allows for a departure from the general principle that, in consequence crimes, the state must establish a link between the unlawful consequence and the conduct of the accused, serving to alleviate the burden on the prosecution to prove the

¹³⁰ Snyman *Criminal Law* 255-256.

¹³¹ This is the "prior agreement" scenario where, e.g., a vigilante group agrees to undertake an armed march to the home of a known drug-dealer with the aim of attacking or killing him. All who are parties to this joint agreement may be held liable for the drug-dealer's death in a subsequent shooting carried out between members of the vigilante group and the drug dealer. Liability could ensue even for group members who were not on the scene of the crime at the time of the killing.

¹³² The "active association" form of common purpose would be most commonly applied in the instances of spontaneous mob justice – see *S v Safatsa and others* 1988 1 SA 868 (A) and *S v Mgedezi and others* 1989 1 SA 687 (A). In 705I-706B, extra requirements were prescribed for common purpose where prior agreement was absent, namely (1) presence at the scene of the violence; (2) awareness of the assault; (3) intention to make common cause with the actual perpetrators of the assault; (4) "performing some act of association" that manifests the sharing of a common purpose with the conduct of the others; and (5) the necessary fault (*mens rea*), which is also a requirement for prior agreement common purpose. These requirements were cited and approved of in *S v Thebus* (see paras 20 and 50).

¹³³ Burchell *Principles* 467; Snyman *Criminal Law* 256-257.

¹³⁴ *S v Safatsa and others* 897A.

causal contribution of each and every participant to the unlawful consequence beyond reasonable doubt.¹³⁵

The state frequently invokes the common purpose doctrine to prosecute cases involving vigilantism. Since a mandate or prior agreement to commit a specific crime can seldom be proven in vigilante cases, the state most often uses the active association variant of common purpose to obtain convictions.¹³⁶ Significantly, much of the key case law concerning the common purpose doctrine comprises of such vigilante-type scenarios. For example, *S v Safatsa*¹³⁷ (also known as the “Sharpeville Six” case), where the SCA decisively held that causation need not be proven in instances of common purpose, was a case of apartheid-era vigilantism of the active association type. In 1984, following wide-spread riots against the planned increase of service levies, a mob of approximately 100 people stoned and then burned to death the deputy mayor of the Lekoa town council for being a “sell-out” to the white authorities for favouring the plan.¹³⁸ It was not possible to determine which specific crowd members were responsible for the killing. In the end, only six members of the crowd were convicted of murder and sentenced to death based on the application of the common purpose doctrine, including a woman whose sole contribution to the outcome had been to shout repeatedly, “Hy skiet op ons, laat ons hom doodmaak”¹³⁹ and to slap a woman for opposing the plan to burn the deceased.

The most important post-1994 era common purpose case – *S v Thebus*,¹⁴⁰ where the constitutionality of the doctrine was confirmed – is also a vigilante scenario. It concerned a group of vigilantes from Ocean View in Cape Town who, in November 1998, decided to act against those whom they suspected of being drug dealers. They armed themselves and visited the

¹³⁵ Burchell *Principles* 473.

¹³⁶ Even in *S v Thebus*, where there was clearly a preceding agreement among community members to embark on an armed march to the homes of suspected drug-dealers, participants in the subsequent killing of a bystander who was killed in the crossfire between vigilantes and a drug dealer were viewed as part of the common purpose via active association, with Moseneke J holding that “the evidence does not prove any ... prior pact” (para 19).

¹³⁷ *S v Safatsa and others*.

¹³⁸ 888D-E; 889C.

¹³⁹ “He is shooting at us, let us kill him” (889D).

¹⁴⁰ *S v Thebus*.

addresses of suspected drug dealers, assaulting them and destroying their property. The vigilantes were driving in a motorcade at an intersection close to populated blocks of residential flats when a suspected drug dealer, whose house they had damaged earlier that day, discharged his firearm in their direction. Members of the group returned fire, and a seven-year-old girl was killed in the crossfire.¹⁴¹ The two men eventually convicted of her murder in accordance with the common purpose doctrine were identified by a single witness as standing nearby holding a pick handle and retrieving spent cartridges discharged from the firearms of the other vigilantes, respectively.¹⁴² As is well illustrated by both the *Safatsa* and *Thebus* cases, even peripheral participation in a common purpose may result in conviction, despite there being no causal link between the conduct of the accused and the deadly outcome.

So what is the justification for this drastic departure from the underlying foundation of criminal law, namely that the state needs to prove *all* elements of criminal liability beyond reasonable doubt – including causation in the case of consequence crimes – before an accused can be convicted and punished? The rationale for the common purpose doctrine is clearly based on expediency.¹⁴³ The Constitutional Court in *Thebus* declared that the aim of common purpose doctrine is to combat the “significant societal scourge” of crimes committed by individuals “acting in concert”. Requiring proof of causation as a prerequisite for liability in instances of collective criminal conduct would, opines Moseneke J, “make prosecution of collaborative criminal enterprises intractable and ineffectual”.¹⁴⁴ Moseneke J tries valiantly to defend his reasoning for retaining the doctrine, declaring:

“[The common purpose doctrine] serves vital purposes in our criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their

¹⁴¹ *S v Thebus and another* para 1.

¹⁴² Para 4.

¹⁴³ M Reddi “The Doctrine of Common Purpose Receives the Stamp of Approval: Notes” (2005) 122 (1) *SALJ* 59 64.

¹⁴⁴ *S v Thebus* para 34.

unlawful and intentional participation in the commission of the crime. Such an outcome would not accord with the considerable societal distaste for crimes by common design. Group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals. Effective prosecution of crime is a legitimate, ‘pressing social need’. The need for ‘a strong deterrent to violent crime’ is well acknowledged because ‘widespread violent crime is deeply destructive of the fabric of our society’. There is a real and pressing social concern about the high levels of crime.”¹⁴⁵

It is submitted that Moseneke J’s reasoning is unpersuasive, being high on emotive and punitive sentiment and low on substance. His rather vague, repetitive and clichéd litany of complaint against collective wrongdoing gives the impression that he is protesting too much. Most of his objections to joint criminal enterprises are equally applicable to crimes committed by a single individual,¹⁴⁶ and his implication that some participants in acts of collective violence would walk free should the common purpose doctrine be abolished is simply erroneous.¹⁴⁷ Ironically, despite citing a passage in *S v Dhlamini*¹⁴⁸ warning against using the alarming level of crime to justify extensive and inappropriate invasions of individual rights,¹⁴⁹ Moseneke J then proceeds to do precisely that by confirming the constitutionality of the common purpose doctrine.

While some writers are supportive of the Constitutional Court’s upholding of the constitutionality of the common purpose doctrine, citing crime-control rationales similar to those of Moseneke J,¹⁵⁰ others¹⁵¹ are of the

¹⁴⁵ Para 40.

¹⁴⁶ For a critique of this aspect of Moseneke J’s reasoning, see also Snyman *Criminal Law* 262-263 n 55.

¹⁴⁷ The many other options available for convicting multiple participants in crimes are outlined in § 6 3 2 2 below.

¹⁴⁸ *S v Dhlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 4 SA 623 (CC) para 68.

¹⁴⁹ In n 65 of the judgment.

¹⁵⁰ See, e.g., Reddi (2005) *SALJ* 66, who says, “It is ... fortunate that the Constitutional Court has rescued the doctrine of common purpose from further attempts at extinguishing it. In a society that is currently reeling from the impact of a pandemic of serious crimes committed by collective individuals acting in concert, the doctrine of common purpose is crucial to the eradication of the ubiquitous threat posed by such criminals” and Snyman *Criminal Law* 262, who welcomes the

view that the common purpose doctrine is a “truly unnecessary evil”,¹⁵² the continued application of which does indeed violate a number of constitutional rights. Constitutional arguments against the common purpose doctrine are applicable to both its prior association and active agreement manifestations. However, Burchell claims – correctly, it is contended – that constitutional objections to common purpose liability are particularly persuasive where liability is based on the active association of a large group.¹⁵³ Where there is the prior agreement of a small, organised band of criminals, special principles of imputation may more easily be justified – a perspective seemingly in line with that of Moseneke J above, where he specifically decries “group, organised or collaborative misdeeds”, appearing to place emphasis on the reprehensibility of co-perpetratorship’s pre-planning aspect.¹⁵⁴ For this reason, constitutional objections to common purpose may be deemed especially relevant in the “amorphous group”¹⁵⁵ context, which is typical of vigilante mob justice.

The arguments in favour of excising the common purpose doctrine from our law will not be comprehensively canvassed here.¹⁵⁶ Critique of the doctrine will be confined to the most persuasive contention, namely that its dispensing with proof of the causal element in circumstance crimes contradicts the fundamental rule that the prosecution must prove the elements of liability beyond reasonable doubt and in so doing, infringes the presumption of innocence.¹⁵⁷ Moseneke J dismisses the argument that the right to be presumed innocent is violated. His view is that the doctrine “neither places an onus upon the accused, nor does it presume his or her guilt. The state is required to prove beyond a reasonable doubt all the elements of the crime

decision “despite the fact that the grounds advanced by the court for its decision do not always go to the core of the reason for the existence of the doctrine”.

¹⁵¹ See, especially, Burchell *Principles* 475-483 and J Grant “Common Purpose, *Thebus*, Marikana and Unnecessary Evil” (2014) 30 (1) *SAJHR* 1.

¹⁵² Grant (2014) *SAJHR* 23.

¹⁵³ Burchell *Principles* 477-478.

¹⁵⁴ *S v Thebus* para 40.

¹⁵⁵ Burchell *Principles* 478.

¹⁵⁶ For instance, there are some rather far-fetched claims in Grant (2014) *SAJHR* regarding the extent of the common purpose doctrine’s deviation from the general principles of criminal law that need not detain us here.

¹⁵⁷ Burchell *Principles* 476.

charged under common purpose.”¹⁵⁸ What Moseneke J overlooks, however, is that absolving the state of the burden to prove causation does far more than create a reverse onus or presume that causation has been established: by imputing the causal contribution of one participant to all co-perpetrators, “it places the issue of the proof of causation beyond any proof that an accused could raise”¹⁵⁹ and allows for the possibility of an accused being convicted despite the existence of reasonable doubt in their favour.

What is more, since Moseneke J is of the view that no rights are infringed by the common purpose doctrine, he does not even consider whether or not any limitation of an accused’s presumption of innocence is defensible in terms of section 36(1) of the Constitution. There is good reason for supposing that if a limitations analysis were engaged in, it would conclude that the seeming violation of the right to be presumed innocent is not reasonable, nor is it justifiable. The most important question to be addressed in this exercise is whether it is possible for the state to deal effectively with instances of mob vigilante violence without the aid of the common purpose doctrine.¹⁶⁰ It is clear that there are a range of alternative means of punishing persons involved in joint criminal activity, including public violence,¹⁶¹ attempt,¹⁶² conspiracy,¹⁶³ incitement¹⁶⁴ or holding them liable as

¹⁵⁸ *S v Thebus* para 43.

¹⁵⁹ Grant (2014) *SAJHR* 15.

¹⁶⁰ 17.

¹⁶¹ Public violence occurs where a number of persons act in concert, unlawfully and intentionally to commit sufficiently serious acts which are intended to disturb the public peace or security forcibly, or to violate the rights of others (Burchell *Principles* 755; Grant (2014) *SAJHR* 21). Most if not all acts of group vigilantism would also amount to public violence.

¹⁶² An attempt is when an accused, intending to commit a crime, nevertheless fails in their purpose. To qualify as an attempt, the accused’s conduct must go beyond mere acts of preparation – they must have commenced with the consummation of the crime (*R v Schoombie* 1945 AD 451 545-547). It is easily conceivable that a participant in vigilante violence could be guilty of attempted murder for having acted in such a way as to demonstrate their intention to cause the death of a victim and having proceeded beyond the preparation stage, but where another carries out the actual killing.

¹⁶³ A conspiracy is an agreement between two or more persons to “commit, or to aid or procure the commission of, a crime” (Burchell *Principles* 529). This would apply in instances where there is a prior agreement between vigilantes to commit a crime (such as murdering a suspected robber), regardless of whether that crime is actually perpetrated later.

¹⁶⁴ Incitement is where one person (the inciter) makes a communication to another (the incitee) with the intention of influencing the incitee to commit a crime (Burchell *Principles* 519). Without a doubt, accused no 4 in *S v Safatsa and others*, who encouraged others to kill the deputy mayor, was guilty of incitement.

accomplices¹⁶⁵ to a crime committed by the main perpetrator(s). Far from allowing a vigilante to “get away with murder”, all these options permit the courts to impose – where appropriate, depending on the accused’s degree of participation – punishments as severe as if the vigilante had been convicted of the main offence.¹⁶⁶ The plethora of other options available for convicting vigilantes illustrates that it is indeed possible to realise the (undoubtedly important) objective of crime control whilst advancing the interests of “fair labelling”¹⁶⁷ – shifting from an approach based on imputed co-perpetrator liability under the common purpose principle to one that focuses on punishing an accused for what they actually did.

6 3 2 3 Criminalising vigilantism separately: Comparing the practical application and implications of strategies focusing on forward-looking restoration v backward-looking retribution

Convicting a vigilante for being an accomplice to murder, for having participated in public violence, for inciting harm to another¹⁶⁸ or for having attempted to defeat the administration of justice¹⁶⁹ instead of harnessing the common purpose doctrine to convict them of murder, is clearly a step in the right direction as far as the fair labelling of vigilante misdeeds is concerned. However, it is submitted that the ideal of fair labelling in the vigilante context may only truly be realised if vigilantism is criminalised as a separate offence. In chapter 2, the elements of a proposed crime of vigilantism were outlined and explained. To recap, the crime of vigilantism would occur where a person or persons in their private capacity unlawfully and intentionally use (or threaten to use) force against the person or property of another who is the

¹⁶⁵ Accomplices are participants who further or assist in the commission of a crime prior to its completion, without qualifying as actual perpetrators (*S v Williams en 'n ander* 1980 1 SA 60 (A)).

¹⁶⁶ See the Riotous Assemblies Act 17 of 1956 s 18(1) and 18(2) in respect of incitement, conspiracy and attempt to commit a statutory offence. Where common law attempt liability is concerned, punishment is generally less severe because less harm is caused, but an accomplice to a crime whose contribution is more substantial than that of the actual perpetrator may actually be punished more severely than the perpetrator (Burchell *Principles* 517; 502).

¹⁶⁷ See the discussion of fair labelling in § 2 7. It is submitted that criminalising vigilantism separately is an even better way of abiding by this principle.

¹⁶⁸ See the accused in *S v Safatsa and others* who encouraged others to kill the deceased.

¹⁶⁹ See the accused in *S v Thebus* who was responsible for collecting the used shell-casings.

perpetrator of an actual, potential or imputed criminal or non-criminal wrongdoing. The specific intention of the vigilante(s) must be to punish such person, and their conduct must be aimed (at least in part) at offering guarantees of collective security and social order in circumstances where there is a real or perceived absence of effective formal guarantees of order and security. Vigilantism so defined is not a consequence crime (i.e., it does not criminalise the *causing of* harm), focusing instead on whether or not force is used, which means that the common purpose doctrine is irrelevant for its utilisation.

The main benefit of criminalising vigilantism separately – beyond the crucial fair labelling considerations already mentioned – would be so that a nuanced and specifically-targeted sentencing regime could be devised and implemented for those convicted of vigilantism. That there is little unanimity about how to punish those guilty of vigilante crimes is evident if the trial and Supreme Court of Appeal (“SCA”) judgments of *S v Thebus* are compared. In the Western Cape High Court, Mitchell AJ used the common purpose doctrine to convict both accused of one count of murder and two counts of attempted murder, but appears very sympathetic towards them in the sentencing phase. He sentences each to eight years’ imprisonment, suspended for five years on condition that they are not found guilty of a violent crime or a crime against the state during the period of suspension, and that they each perform eight hours of community service per week at their local police station for a three-year period.¹⁷⁰ Mitchell AJ justifies his view that substantial and compelling circumstances exist for a lesser sentence than life imprisonment on the basis, *inter alia*, of the frustration felt by the Ocean View community at the inability of the police to deal with gangsterism and drug-dealing, and argues that the entire community should shoulder responsibility for the tragic events that occurred when the vigilante group descended on Ocean View.¹⁷¹ While he does not regard those factors as excusing the two accused’s behaviour, he does opine that they go a long way towards explaining it.¹⁷²

¹⁷⁰ *S v Thebus and another* 570B-D.

¹⁷¹ 585E.

¹⁷² 579C.

By contrast, when the state appealed these sentences to the SCA on the basis that they were “unduly light and induced a sense of shock”,¹⁷³ the judges of the SCA upheld the appeal. In his minority judgment, Navsa JA opines that Mitchell AJ fundamentally misdirected himself, and that the present instance – a scenario involving “mob and gang rule and general lawlessness” – is precisely the type of case that the legislature had contemplated when providing for a life sentence for murder.¹⁷⁴ Navsa JA describes the vigilante group as violent and bloody-minded, and says that “[w]ith the intention of rooting out drug dealers who terrorised a township they then proceeded to terrorise the community even further”.¹⁷⁵ Since the deaths “flowed from vigilante action” and so as to send a message to “those who are intent on bringing their own brand of justice to bear on communities, without regard for the lives of innocents and the breakdown of law and order [that they] will face the full force of the law”, he proposes a life sentence for the accused.¹⁷⁶ Similarly, Lewis AJA, who wrote the majority judgment, views the trial court’s sentence as “grossly inadequate for the punishment of the appellants and as a deterrent to others who might take it upon themselves to deal with criminal conduct by perpetrating crimes themselves”.¹⁷⁷ She does not consider the community’s frustration with police inability to deal with drug-dealers and gangsters to be mitigating.¹⁷⁸ She agrees with Navsa JA that the conduct of the vigilante group “would have added to the fear felt generally by people living in Ocean View”.¹⁷⁹ However, she does regard as extenuating the fact that the accused were convicted in terms of the common purpose doctrine: while they were legally and morally responsible for the death and injuries, it was significant that “they did not actually shoot and neither was seen using a firearm”.¹⁸⁰ She holds that justice would be served by sentencing them to fifteen years’ imprisonment rather than life

¹⁷³ 570E.

¹⁷⁴ 579D-F.

¹⁷⁵ 579F-I.

¹⁷⁶ 580C; 580F; 580H.

¹⁷⁷ 586A-B.

¹⁷⁸ 585E.

¹⁷⁹ 585F.

¹⁸⁰ 585G-H.

imprisonment¹⁸¹ – still a substantial increase in the sentence imposed by the court a quo.

This judicial dilemma – whether to punish harshly to express disapproval of vigilantism and to deter others from exercising self-help, or to punish lightly to take into consideration the tragic societal reality precipitating acts of vigilantism – is eloquently addressed in a more recent sentencing judgment by Western Cape High Court judge Binns-Ward J in *S v Dikqacwi*.¹⁸² The three accused had been convicted of assault, kidnapping and housebreaking committed during an attempt to investigate and deal with individuals suspected of impersonating police officers in order to rob community members.¹⁸³ In arriving at an appropriate punishment Binns-Ward J recognises the need to:

“acknowledge that *crimes committed in the context of vigilantism will often be different from the same acts perpetrated out of greed or delinquency*. While their gravity should not be seen as being diminished on that account, the context does, I think, *justify consideration of a different response when it comes to sentencing*; one determined with especial regard to the need to promote rather than retard societal reconstruction and rehabilitation.”¹⁸⁴

Even more significantly, he appreciates that the application of constitutional values is paramount when assessing the interests of the community while sentencing vigilantes. He makes clear that a sentence cannot appear to be condoning vigilantism and that vigilantism should be “visited with the sanction of the law”, also recognising the need for punishment to “be of such a nature that [it] objectively promotes confidence in the justice system”.¹⁸⁵ However, rather than responding in the usual knee-jerk fashion and taking this as an invitation to impose a severe sentence,

¹⁸¹ 585H-I; 586C.

¹⁸² *S v Dikqacwi and others*.

¹⁸³ Para 2.

¹⁸⁴ Para 8 (emphasis added).

¹⁸⁵ Para 9.

substantiating his choice with reference to the interests of the community and the need for deterrence, what he says next comprises a refreshingly different and perceptive perspective into how best to incorporate constitutional values when sentencing vigilantes:

“The values of the constitution do not, however, enjoin indiscriminately visiting brutal and brutalising behaviour in the context of vigilantism with uncompromising severity and formalised inhumanity. There should rather, as far as possible, be an endeavour, in the determination of punishment, a *striving towards a humanising and debtralising result. Meeting the problem and its effects with unmitigated harshness will do nothing to address the underlying causes, and does not serve the interests of the community, or promote the realisation of a society based on constitutional values.*¹⁸⁶

Because his take on vigilante punishments is informed throughout by his careful reflection on why vigilantes do what they do, his focus is squarely on the importance of “avoiding formalised inhumanity” and the brutalising consequences of imposing over-harsh punishments on vigilantes. Indeed, he argues against incarcerating vigilantes, whom he describes as “persons who are generally functioning well within society – albeit a dysfunctional society”. In addition to risking “returning to the community damaged, and even more problematic persons at the end of the exercise”, imprisonment, according to Binns-Ward J:

“will not address the causes of vigilantism and is unlikely, in my view, to provide an effective deterrent. On the contrary, having regard to the reported attitude of the affected communities towards vigilantes, it might well conduce to a greater alienation of the members of such communities from the formal criminal justice system. They might see lengthy terms of imprisonment as indications of the system being harsh on those who they see as

¹⁸⁶ Para 9 (emphasis added).

the ones trying to do something effective about crime while it is otherwise soft on crime, or ineffective about it.”¹⁸⁷

With this in mind, Binns-Ward meticulously constructs a detailed set of community corrections for each accused in accordance with the Correctional Services Act.¹⁸⁸ These include a wholly suspended prison sentence of seven years and a three-year period of correctional supervision, incorporating house arrest, 16 hours of community service a month, the retention of employment, the payment of monetary compensation to the victims, refraining from alcohol and drugs, and participation in appropriate treatment, development and support programmes.¹⁸⁹ A month later, when a similar case involving the sentencing of vigilantes convicted of kidnapping and assault with intent to do grievous bodily harm came before the Western Cape High Court (*S v Mvabaza*),¹⁹⁰ Nyman J followed Binns-Ward J's lead. Considering the “scourge of vigilantism that has plagued the community of Khayelitsha”¹⁹¹ to be both a “mitigating and aggravating factor”,¹⁹² he imposed a comparable sentence to that of the accused in *Dikqacwi*: a wholly suspended prison sentence, combined with the non-custodial options of house arrest, community service, attendance of anger management and victim-offender dialogue programmes, payment of compensation to the mother of the deceased and abstention from using alcohol and drugs.¹⁹³

The willingness to embrace restorative and innovative approaches to punishing vigilantes demonstrated in the *Thebus* court a quo decision, *Dikqacwi* and *Mvabaza* is to be applauded. While this chapter has concentrated mainly on the exclusionary aspect of penalties for vigilantism, the next chapter includes a more in-depth look at sentencing perspectives that are more inclusive and integrative. It will be argued that employing and championing restorative justice solutions to vigilantism allows the state to

¹⁸⁷ Para 7.

¹⁸⁸ Correctional Services Act 111 of 1998 s 50(1)(a) and s 52(1).

¹⁸⁹ *S v Dikqacwi and others* para 32.

¹⁹⁰ *S v Mvabaza*.

¹⁹¹ Para 7.

¹⁹² Para 9.

¹⁹³ Paras 23-25.

demonstrate non-violent dispute resolution strategies, thereby actively “promot[ing] the realisation of a society based on constitutional values”.¹⁹⁴

6 4 Conclusion

This chapter has shown that there is a place for human-rights-compatible exclusionary strategies in the state’s relegitimation arsenal. First, it appears that the state may indeed enhance its self-legitimated dual identity as crime-fighter and upholder of human rights by making significant but affordable changes to the current policing paradigm. If police and other criminal justice agents are seen as executing their core obligations in direct response to individual and community concerns, appearing active and engaged in carrying out their duties, and treating citizens with an acknowledgement of their shared humanity and their worthiness of equal respect and concern, this is likely to promote a closer affinity between the criminal justice system and the public.¹⁹⁵ Procedural justice policing combined with minimalist and minimal policing may thus contribute to increased state legitimacy, foster law-abidingness and also lessen the propensity of individuals to resort to vigilantism. Second, where the state’s exclusionary focus is on discrediting and undermining vigilante influence, this can be done in such a way as to portray the state’s own exercise of crime-fighting power as a far more just way of doing justice than vigilante self-help. And by criminalising vigilantism separately, and tailoring appropriately restorative penalties for this crime, the state may demonstrate its commitment to fair labelling and tackle vigilante violence in a manner that is responsive to the insight that vigilantism is often a product of the dysfunctionality of society, not necessarily the inherent deviance of vigilantes themselves.¹⁹⁶

The state “relegitimation through exclusion” strategies outlined above have as their underlying premise that vigilante legitimation occurs at the expense of state power: that the best way for the state to reverse such

¹⁹⁴ *S v Dikqacwi and others* para 9.

¹⁹⁵ Bradford, et al. (2014) *Regulation & Governance* 262.

¹⁹⁶ See *S v Dikqacwi and others* para 7.

undermining of its authority is by exercising its ostensible monopoly on the use of coercive force by demonstrating its ability to deal effectively and fairly with those who act in contravention of its decree, including vigilantes. However, as has already been observed¹⁹⁷ it is not necessarily helpful to perceive the relationship between vigilante and state legitimacy solely as a “zero-sum game”. Would it not be preferable for the state somehow to appropriate positive vigilante crime-fighting energies, growing stronger itself at the same time as empowering vigilantes to become responsible rather than autonomous citizens¹⁹⁸ in the criminal justice sphere? Exploring this possibility of a “plus-sum legitimacy game” where vigilantes and the state are concerned is a central theme of the following chapter.

¹⁹⁷ See § 6 1 above.

¹⁹⁸ See § 2 5 2 above and Johnston (2001) *Urban Studies* for more on the distinction between “responsible” and “autonomous” citizenship.

7 CHAPTER SEVEN: RELEGITIMATION THROUGH VIGILANTE INCLUSION

7.1 The fallacy of a “zero-sum game” with respect to vigilante power

The previous chapter came to the conclusion that the state might be wise to concede that sovereign crime control is indeed a myth. State options for regaining legitimacy in the context of non-hegemonic security provision focused on the efficient provision of a narrower range of core law-enforcement services in a manner that would promote the ideals of procedural justice and be responsive to community demands. Possible ways for the state to undermine the particularly potent “challenge to the state’s law and order mythology”¹ posed by vigilantism were also explored. However, acknowledging vigilantes’ crime-fighting power entails recognising the reality of the state’s positioning as one of many players in the security market. Particular strategies whereby the formal justice sector might persuade the public to choose *them* in preference to the myriad of informal options were highlighted. What will be considered in this chapter is why the state might opt to reassert its power by channelling vigilantes’ informal crime-fighting energies² into more formal avenues of security provision in partnership with the state, and, if it chooses this option, whether it is possible for it to achieve its aim without sacrificing its commitment to safeguarding human rights.

In contrast to the exclusionary strategies explored in chapter 6 that presuppose that vigilante empowerment occurs at the expense of state legitimacy, the inclusionary options canvassed here assume that empowering informal criminal justice agents may even help to enhance state legitimacy. This chapter first unpacks the notion of “multi-choice” policing. It next considers the benefits and disadvantages of co-opting informal security

¹ Garland (1996) *British Journal of Criminology* 448.

² Johns *Vigilantism: The Future of South Africa's Security?* 15-16.

providers within state structures, and explains the need for appropriate safeguards for such an endeavour. Two contrasting means of incorporating informal modes of justice provision are then identified, and their strengths and weaknesses critically evaluated. Finally, the chapter considers the flip-side of the state assimilation of informal crime-fighting power, namely how important it is that the state should instil a society-wide recognition of the value of upholding human rights in a way that favours peaceful conflict resolution, *ubuntu* and human dignity.

7 2 Accepting the “multi-choice”³ nature of policing

Taking seriously the possibility of incorporating vigilantes into the state crime-fighting arsenal entails recognising that, notwithstanding their (theoretical) monopoly over the use of legitimate coercion, state criminal justice agents “have been rendered merely another player in the security market, reliant solely on their capacity to deliver a ‘competitive product’”.⁴ This trend of the so-called “commodification of security” implies that citizens are not merely “clients” of the police, but are “customers” or “consumers” of the wider security industry, who shop around for the type of policing that satisfies their particular needs in the most efficient and reliable manner.⁵ In this regard, Baker emphasises the “fluidity” of policing in contemporary society: few people use public or private policing exclusively, moving instead “from the sphere of one security agency to another”.⁶

From a Western, neoliberal perspective on security provision, where the underlying presumption is that each autonomous sovereign state

³ This term is borrowed from Bruce Baker (e.g., Baker *Multi-Choice Policing*; Baker (2004) *Society in Transition*).

⁴ Loader (1999) *Sociology* 377-378. See also Steinberg *Thin Blue* 98; Seekings (1992) *South African Review of Sociology* 197; Baker (2004) *Journal of Contemporary African Studies*; B Baker & E Scheye “Multi-Layered Justice and Security Delivery in Post-Conflict and Fragile States” (2007) 7 (4) *Conflict, Security & Development* 503; Abrahamsen & Williams (2007) *International Relations*.

⁵ Abrahamsen & Williams (2007) *International Relations* 135; Baker (2004) *Society in Transition* 205; and Loader (1999) *Sociology*.

⁶ Baker (2004) *Journal of Contemporary African Studies* 170.

exercises exclusive force over its own territory,⁷ diversification among security providers may be understood as one of the manifestations of a global inclination towards “devolution” or “privatisation” of state functions: Policing has been transformed from a “limited activity of government into a pervasive, dispersed mechanism of governance”.⁸ The trend of states decentralising or delegating their police competencies to civil society⁹ was noted in the context of the state strategy of “responsibilisation” discussed in § 4 2 3. The idea of “governing at a distance”¹⁰ involves the state limiting its role to controlling the “steering” of security governance, while expanding those involved in its “rowing”.¹¹ It must be noted that this neoliberal characterisation of “multi-choice” policing is of doubtful accuracy in countries where the notion of the strong nation state is lacking since, as has already been argued,¹² in such settings it is especially erroneous to assume that absolute state sovereignty – including a monopoly on the use of force – was ever more than a falsehood perpetuated by those in power. Be that as it may, the reality today is that all citizens, wherever they live, have access to a “layered network of alternative and overlapping provi[ders] of security and justice”.¹³

It is submitted that nodal governance theory is a useful analytical model for understanding the multifaceted contemporary security landscape that is “cluttered with a multiplicity of state and non-state, commercial and informal organisations whose agendas, resources and operational methods often vary in the extreme”.¹⁴ This perspective deconstructs the state-centred conception of governance referred to above, preferring instead to recast the various groups associated with security as “interdependent and contiguous nodes which interact within a broader network”.¹⁵ What is particularly significant about nodal theory is the insight that no “conceptual priority” should

⁷ See C Shearing & J Wood “Nodal Governance, Democracy and the New 'Denizens'” (2003) 30 (3) *Journal of Law and Society* 400 401 for more on this “Westphalian model” of state sovereignty.

⁸ Loader (2000) *Social and Legal Studies* 329.

⁹ Wisler & Onwudiwe (2008) *Police Quarterly* 435.

¹⁰ See Garland *Culture of Control*.

¹¹ L Johnston “From 'Pluralisation' to 'the Police Extended Family': Discourses on the Governance of Community Policing in Britain” (2003) 31 *International Journal of the Sociology of Law* 185 188.

¹² See § 3 5 2 2 above.

¹³ Baker & Scheye (2007) *Conflict, Security & Development* 515.

¹⁴ J R Martin “Informal Security Nodes and Force Capital” (2012) 23 (2) *Policing and Society* 145 146.

¹⁵ 146.

be given to any particular node: security governance is a dynamic and ongoing process, while the exact nature of such governance and the contribution of the various nodes to it are “empirically open questions”.¹⁶ Shearing and Wood differentiate the wide array of nodes involved in contemporary security provision according to the sector in which they are involved. Three sectors, namely the state, corporate or business and non-governmental organisations encompass the formal nodes of security provision, while a fourth relates to informal security provision.¹⁷

Clearly, particularly in the context of what Baker and Scheye term “post-conflict or fragile states”, it would be naïve to assume that the state is the dominant node within existing security networks, or even that these nodes within networks – whether formal and informal – are co-operative rather than competitive.¹⁸ It is apparent that while some of the nodes responsible for security provision fall within the ambit of the state or are at least nominally formally state-sanctioned and regulated (for example commercial private security firms and non-commercial formal neighbourhood watch schemes), others – including vigilante groups – are not.

7 3 Appropriating vigilante power

In this section it is asked whether it is possible to realise Schärff’s vision of vigilante movements being harnessed into a “productive, legal and mutually beneficial” collaboration with the state,¹⁹ and the pros and cons of appropriating various aspects of vigilantes’ crime-fighting power are explored.

¹⁶ Shearing & Wood (2003) *Journal of Law and Society* 404.

¹⁷ 405. For more information on nodal governance theory, in particular the role of informal security nodes, see Martin (2012) *Policing and Society*. See also Venugopal (2015) *Economy and Society* 170 for more on the link between “deep” neoliberalism, governmentality and nodal governance.

¹⁸ Baker & Scheye (2007) *Conflict, Security & Development*.

¹⁹ Schärff (2001) *IDS Bulletin* 80.

7 3 1 *Benefits of incorporating vigilante power*

It may be in the state's best interests to contemplate a "legitimate coexistence"²⁰ with vigilantes for a variety of reasons.

First, considering what was said earlier about the prohibitive cost of access to formal justice,²¹ it makes sense for the state to seek to co-opt "what enjoys popular support and legitimacy, and is appropriate in a setting of poverty".²² Rather than continuing to flog the dead horse of maintaining a monopoly of criminal justice provision, this allows the state to accept that "the state police are marginal in particular contexts and geographic spaces"²³ and opt to actively encourage and learn from non-state ways of social ordering instead. Such grass-roots alternatives usually have a high degree of local ownership and tend to provide more effective solutions to everyday security problems than "inorganic, top-down" state interventions".²⁴

Second, by making vigilantes "legitimate counter-partners"²⁵ the state is able to extend its reach by monitoring groups that were formerly seemingly beyond its sphere of influence. If informal justice initiatives are legitimised under law there is the potential for vigilante activity to be subjected to more effective scrutiny and to be held accountable for any failure to abide by agreed-upon norms and standards.²⁶ For example, Meagher argues that the state should appropriate the "energy and integrity" of successful private security initiatives by bringing such initiatives under the control of the formal legal framework, because not doing so risks leaving them "to spin out of control or be derailed by opportunistic politicians".²⁷ Similarly, Schärf is of the view that having good working relationships and/or partnerships between police and informal criminal justice structures makes it more likely that the state would be able to keep such structures in check so as to curtail

²⁰ Schärf & Nina *The Other Law* 13.

²¹ See § 4 2 2 above.

²² Baker (2007) *Acta Juridica* 191.

²³ Baker & Scheye (2007) *Conflict, Security & Development* 515.

²⁴ Marks, et al. (2009) *Police Practice and Research* 151.

²⁵ Buur *Outsourcing the Sovereign: Local Justice and Violence in Port Elizabeth* 29.

²⁶ For similar arguments, see Yanay (1993) *Journal of Public Policy* 394; Rosenbaum & Sederberg "Vigilantism: An Analysis of Establishment Violence" in *Vigilante Politics* 20.

²⁷ Meagher (2007) *Journal of Modern African Studies* 112.

possible human rights abuses.²⁸ Holding non-state security providers to account in an efficient manner may enable the state to garner greater legitimacy,²⁹ since the state is being seen to demonstrate its capacity to facilitate effective security provision in a manner that is in line with its constitutionally-based mandate. Concrete suggestions as to how the state might use its “extended capacity for action and influence” to induce vigilante groups to comply with basic human rights values are outlined from § 7 4 below.

Third, the contention that the outsourcing of “everyday policing” is indicative of the state’s weakness is not necessarily accurate. On the contrary; in practical terms, co-opting vigilante power would only be a viable option in “frontier” areas where state sovereignty was never effectively realised in any event. It may be argued that incorporation would at least empower marginalised communities to develop low-cost forms of state-sanctioned policing where little to no state-monitored policing occurred before.³⁰ Thus there is some weight to Fourchard’s claim that integrating former vigilante operations as part of state community policing schemes, for example, is “less of a challenge to state sovereignty than an aspect of the dynamic process of state formation”.³¹

On the assumption that legitimating already-existing informal crime-fighting bodies could enable the state to benefit vicariously from community-supported vigilante groups’ popular mandate, a fourth, more cynical, benefit of vigilante incorporation is that assimilating dissenting (vigilante) voices is an effective means of defusing resistance to the state.³² Anthropologist Lévi-Strauss observes that some societies are cannibalistic in that they “regard the absorption of certain individuals possessing dangerous powers as the only

²⁸ W Schärf “Policy Options on Community Justice” in W Schärf and D Nina (eds) *The Other Law: Non-State Ordering in South Africa* (2001) 53.

²⁹ Baker & Scheye (2007) *Conflict, Security & Development* 520.

³⁰ Hansen & Stepputat (2006) *Annual Review of Anthropology* 308.

³¹ L Fourchard “The Politics of Mobilization for Security in South African Townships” (2011) 110 (441) *African Affairs* 607 627.

³² R Coleman, J Sim & D Whyte “Power, Politics and Partnerships: The State of Crime Prevention on Merseyside” in G Hughes and A Edwards (eds) *Crime Control and Community: The New Politics of Public Safety* (2002) 101.

means of neutralizing those powers and even turning them to advantage”.³³ Nina argues that incorporating popular justice makes it possible for the state to colonise and counteract “people’s power” initiatives that might otherwise pose a threat to state authority.³⁴ Similarly, mobilising forms of community justice such as vigilantism may merely be a pretext for the state to exercise more invasive and far-reaching social control in the name of crime prevention.³⁵ This may be beneficial to the state, perhaps, but many citizens might prefer a more hands-off approach.

7 3 2 Difficulties with incorporating vigilante power

Despite the potential benefits, attempts to forge a working relationship between state and non-state policing may also have significant disadvantages.

First, as was noted in chapter 4, state “responsibilisation” may inadvertently trigger vigilantism. Analysing anti-paedophile vigilantism in Portsmouth, Evans argues that the state “language of empowerment, responsibility and active citizenship” may be “mentally burdensome” for vulnerable and ill-resourced communities, making them more susceptible to participating in vigilantism.³⁶ Even where the state acts in good faith in attempting to incorporate informal justice structures into the formal domain, owing to the thin line between legitimate citizen action and vigilantism³⁷ newly-minted “responsible citizenship” initiatives may all too easily revert to, or degenerate into, chaotic “autonomous citizenship”.³⁸ For this reason, B  nit-

³³ Quoted in J Young *The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity* (1999) 56.

³⁴ Nina *Re-Thinking Popular Justice* 15; 79.

³⁵ Johns *Vigilantism: The Future of South Africa's Security?*.

³⁶ Evans (2003) *Theoretical Criminology* 180-182. In this vein, Brown *Undoing the Demos* 134 also notes that “responsibilized individuals [may be] required to provide [public goods such as security provision] for themselves in the context of powers and contingencies radically limiting their ability to do so.”

³⁷ Sharp, et al. (2008) *Policing and Society* 248.

³⁸ For more on the distinction between responsible and autonomous citizenship, see Johnston *Rebirth of Private Policing*; Johnston “Private Policing, Vigilance and Vigilantism: Commercialisation and Citizenship and Crime Prevention Strategies” in *Preventing Crime and Disorder: Targeting Strategies and Responsibilities* and § 2 5 2 above.

Gbaffou condemns government efforts to urge “‘communities’ to (re)build and implement their own social order”, interpreting initiatives such as the public enhancement of street patrols as “a cynical encouragement of vigilantism”.³⁹ She correctly notes that the state attitude towards vigilantism is plagued by “very ambiguous discourse”.⁴⁰ While vigilantism is publically condemned, township residents are nevertheless being exhorted to implement their own security measures based on locally-defined social norms that frequently undermine basic human rights. The state responsabilisation strategy thus allows scope for seemingly state-authorised forms of community control (including vigilantism) to develop in poorer neighbourhoods.⁴¹

Second, co-opting vigilantes holds the danger that “legitimated” vigilantes will simply continue acting as they have all along, freely engaging in activities involving excessive force and intimidation under the guise that it is now state-sanctioned. The Khayelitsha Commission report cites witnesses who mentioned that (presumably state-sanctioned) community patrols had assaulted people perceived to be criminals, remarking that “there is often a fine line between a community system aimed at promoting safety and security, and forms of vengeance attacks”.⁴² Buur’s⁴³ description of the *Amadlozi* vigilante group vividly demonstrates that merely labelling a former vigilante group a CPF does not automatically alter its violent character. Even though it was accepted as a formal structure, *Amadlozi* did not stop using force; it now merely had to be careful to use force in what was perceived to be an “acceptable” manner – i.e., in such a way that no charges could be laid against its members by victims. What the *Amadlozi* CPF viewed as “minimal force”⁴⁴ – compelling suspects to stand on their heads for long periods of time, assaulting them on body parts where marks are not left, or letting suspects beat each other up – is manifestly and unacceptably violent. Fourchard’s account of an incident during which a group of 50 NW members severely beat

³⁹ Bénit-Gbaffou (2008) *Journal of Southern African Studies* 102.

⁴⁰ 106.

⁴¹ Bénit-Gbaffou (2006) *Urban Forum* 311; Bénit-Gbaffou (2008) *Journal of Southern African Studies* 106.

⁴² O’Regan & Pikoli *Khayelitsha Commission Report* 387.

⁴³ Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 212-215.

⁴⁴ 214.

a man suspected of raping his cousin while he was in a police van⁴⁵ likewise supports the contention that being state-sanctioned does not necessarily divest non-state security organisations of their violent impulses. Numerous other cautionary tales may be cited relating to grassroots crime-prevention groups that were initially operated within the parameters of the law, but whose increasingly violent tactics estranged them from their former “partners”, transforming them from crime-fighters to criminals in the eyes of the authorities.⁴⁶ Still others were backed by the state at the outset (oddly often despite authorities being aware of their unorthodox crime-fighting methods!), but the state was forced to break ties with them at a later stage due to their indiscriminate and extreme use of violence, resulting in loss of both state credibility and public confidence.⁴⁷

Third, quite apart from the issue of vigilante groups becoming more punitive, radical or corrupt over time, the inherent mutability that characterises so much vigilantism makes negotiated tactical alliances between vigilante groups and the state very challenging – even “politically dangerous”.⁴⁸ Nina’s pessimistic view is that even if manifestations of popular justice can somehow

⁴⁵ Fourchard (2011) *African Affairs* 624.

⁴⁶ An example is PAGAD, which transformed over a period of five years from being a *bona fide* crime-fighting organisation that developed within the Neighbourhood Watch tradition and commanded widespread community support to a marginal group with little backing and a radical and increasingly violent agenda, labelled by the government as “urban terrorists” who were “firmly part of the [crime] problem” (Monaghan (2004) *Low Intensity Conflict and Law Enforcement* 8; also Fourchard (2011) *African Affairs* 617; Gottschalk *Vigilantism v. the State: A Case Study of the Rise and Fall of Pagad, 1996-2000* and Dixon & Johns *Gangs, Pagad and the State*).

⁴⁷ A first example of this trajectory is vigilante group *Mapogo A Mathamaga*. Following initial government ambiguity, *Mapogo* was invited to join the CPFs. When this did not succeed, the government opted to work with *Mapogo* outside the structures of the CPFs, which also failed due to the *Mapogo* leadership’s continued endorsement of violent methods. Von Schnitzler remarks, “Wavering between trying to confront and trying to co-opt *Mapogo*, the government has failed in both strategies.” (Von Schnitzler, et al. *Guardian or Gangster? Mapogo A Mathamaga: A Case Study* 25). A second case study is the Bakassi Boys of Nigeria. In the beginning, no government action was taken to rein them in, despite knowledge of their extremely violent methods. On the contrary, local politicians “seized on their popularity, providing them with legitimacy and support.” (Smith *A Culture of Corruption* 170). State governors offered them official backing, giving them formal names, funding, vehicles and political cover. Popular sentiment gradually changed towards the Bakassi Boys owing to the growing realisation that the Bakassi Boys “served the interests of politicians and used their power to exploit rather than rescue the public”. Their popular support was eroded as they collaborated with politicians, became available as thugs for hire and extorted from the very public they were supposed to protect: “They became the criminals they were supposed to fight.” Eventually they were banned by the federal government (187-188; see also Meagher (2007) *Journal of Modern African Studies* and Baker (2002) *Journal of Contemporary African Studies*).

⁴⁸ Baker *Security in Post-Conflict Africa* 35; 67-68.

be incorporated into the state apparatus or become institutionalised, new extra-legal forms will simply emerge:

“Popular justice is a continuum which tends to reproduce itself out of the form that regulates it. It is ... a ‘fraction of a second’. Popular justice never ends, it simply transforms itself and re-emerges in a different form with a different content.”⁴⁹

A fourth concern regarding vigilante incorporation relates to police complicity in vigilantism. In contrast to the formal denunciation of vigilantism by the state, it is often not only the vigilantes themselves but also certain formal criminal justice agents who regard vigilantes’ violent conduct as a “locally accepted exception from the Constitution”.⁵⁰ Jensen quotes a local police station commander in Nkomazi who admits to turning a blind eye to vigilante beatings “for the sake of crime”,⁵¹ and justifies her approach on the basis that very few complaints were received about vigilante violence. Clearly, what she regards as decisive is not whether excessive violence is used, but whether its use remains invisible in the official statistics of the police; if they do not officially “see” the violence, police appear to view themselves as absolved of the duty of dealing with vigilante excesses.⁵² The NW beating of a suspected rapist in a police van before he was handed over to police, recounted earlier,⁵³ has a similar dynamic. Fourchard observes that there appeared to be tacit agreement between the police and NW members concerning the need for the beating, and the violence therefore posed no challenge to the state’s authority.⁵⁴ Whether or not Fourchard is correct in his view that the state’s authority is not threatened by such incidents, criminal justice agents who deliberately overlook acts of vigilantism are making themselves complicit in vigilantes’ use of violent crime-fighting techniques on

⁴⁹ Nina *Re-Thinking Popular Justice* 78.

⁵⁰ Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 215.

⁵¹ Presumably she means “prevention of crime” (Jensen “Through the Lens of Crime: Land Claims and the Contestations of Citizenship on the Frontier of the South African State” in *The Security-Development Nexus: Expressions of Sovereignty and Securitization in Southern Africa* 205).

⁵² 205.

⁵³ See above and Fourchard (2011) *African Affairs* 624.

⁵⁴ 624.

the unsound basis that doing so serves the aim of bringing more criminals to book.

Under the guise of community empowerment, such state agents may also actively co-opt vigilantes to do their “dirty work” for them. A state that is under pressure to be seen to respect human rights may skirt around its democratic obligations by covertly encouraging vigilante violence, since vigilantes’ excessive use of force achieves a crime-fighting aim shared by formal and informal justice agents alike. According to Buur, such informal groups “are not outside the law and the state as such, but act as the ‘extra’ element in policing that makes it possible to combat crime”.⁵⁵ The state, which is not officially permitted to realise its crime-fighting objectives by using methods that violate human rights, “creates a social-political space of force ruled by law beyond the law”⁵⁶ where vigilantes are free to use force against state enemies in a space outside the normal judicial order. Buur sees this is a “nice and neat” way for the state to maintain the illusion that it adheres to a human rights credo while in effect suspending the rule of law by “outsourcing the sovereign power of the state” to vigilantes.⁵⁷ The “cop-out”(!!) attitude of police agents who tolerate or encourage human rights abuses, deeming themselves by so doing to be somehow serving the greater interests of justice, is undesirable in the extreme. It not only serves to endorse and legitimate vigilante violence, but also clearly undermines the state’s formal self-legitimated identity as human rights guarantor.

Finally, because of vigilantes’ self-admitted less-than-stellar human rights record, vigilante incorporation can only take place if vigilante groupings are indeed “reformable”⁵⁸ – i.e., if they acknowledge the need to reform and are prepared to agree to work towards preserving law and order in a manner that is compatible with state-endorsed human rights-based norms and

⁵⁵ Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 215.

⁵⁶ N Gazit “State-sponsored Vigilantism: Jewish Settlers’ Violence in the Occupied Palestinian Territories” (2015) 49 (3) *Sociology* 438 441; see also Agamben *Homo Sacer*.

⁵⁷ Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 215.

⁵⁸ Baker *Security in Post-Conflict Africa* 66.

standards. The contentious issue of state regulation of informal criminal justice providers is considered next.

7 3 3 Regulating vigilante power

It has been argued thus far that the state's monopoly on policing cannot be realised in practice. At most, public providers of criminal justice can hope to perform their core functions reasonably effectively and in a manner that is conducive to due process while avoiding a resort to "punitive and highly interventionist public policing".⁵⁹ Beyond the formal justice system exists a myriad of non-state actors involved in everyday policing processes. If the state is willing to coexist with other security providers in a human rights milieu, there is no doubt that it needs to ensure that all providers – including formal ones – abide by certain norms and standards when delivering security services.⁶⁰

The core policy issue regarding vigilante incorporation is whether it is possible to address the issues relating to non-compliance with basic human rights standards that plague non-state security and justice providers such as

⁵⁹ Marks & Wood (2010) *Theoretical Criminology* 313.

⁶⁰ The state does indeed attempt to regulate some categories of private policing services. In South Africa, the private security industry is estimated to be more than 2.5 times larger than the state police force (for statistics, see K Wilkinson "Does SA have the Largest Private Security Industry in the World?" (2015-01-23) *Africa Check* <<https://africacheck.org/reports/does-sa-have-the-largest-private-security-industry-in-the-world/>> (2015-09-14)). Private security is regulated by the Private Security Industry Regulation Act 56 of 2001 ("PSIRA"). In its preamble, PSIRA declares its purpose to be "to achieve and maintain a trustworthy and legitimate private security industry which acts in terms of the principles contained in the Constitution and other applicable law, [which] is capable of ensuring that there is greater safety and security in the country". In order to achieve this aim, those who wish to be remunerated for providing security services are obliged to register formally as security service providers in terms of the PSIRA. Once registered, their activities are monitored by the Private Security Regulatory Authority, a body that is tasked *inter alia* with ensuring that security services are provided professionally, transparently, accountably, equitably, accessibly, efficiently, responsibly, trustworthily, fairly, objectively and timeously (see ss 3(c), (e), (g) and (i)). Registered security service providers who fail to comply with the security industry's Code of Conduct (Code of Conduct for Security Service Providers vol 450 no 241986 s 25-29) may have their registration suspended or withdrawn; they are also deemed guilty of a criminal offence. Whether private security providers abide by the lofty aims of PSIRA, and whether its Code of Conduct is effectively enforced in practice, are matters that are beyond the scope of the present study. What is certain is that vigilante activities do not fall under the auspices of the PSIRA: unlike their profit-making counterparts in the private security industry, they do not qualify to register. If the state wished to incorporate them officially, separate regulation would be required.

vigilante groups.⁶¹ Can vigilante-type acts indeed take place within an agreed framework set by the state?⁶² It is often assumed that since vigilantes use heavy-handed, over-zealous⁶³ and degrading tactics and lack democratic accountability,⁶⁴ assimilation should not even be attempted because it would inevitably amount to condoning human rights abuses. Even those who view plural policing as a potential solution to law and order issues, like Baker, do not advocate a “blanket acceptance of all providers”.⁶⁵ Nevertheless, Baker and Scheye argue that the most important consideration in deciding whether groups are worthy of supporting and partnering with is not their poor past democratic record, but whether they are willing to engage in reform. Baker and Scheye strongly advocate negotiating tactical alliances⁶⁶ with non-state partners wherever possible, stating:

“[T]here can be no generalised assumption that accountability and protection of human rights is best achieved through state systems. It may, in fact, be the case that non-state systems, as they are closest to their clients, more ‘people-centred’, and ‘locally-owned’ may be more amenable to the preservation of human rights and the delivery of an accountable service, for they more accurately reflect local beliefs and are regarded by local people to be more legitimate.”⁶⁷

They suggest that even groups with little accountability, such as vigilantes, are “rarely ... unwilling in principle to improve”⁶⁸ and are indeed potentially “reformable”. And since the point of security sector reform is precisely to improve what is below standard, then if there is willingness to reform, change is possible.⁶⁹ There can thus be no objection in principle to attempting to assimilate vigilantes within a state-legitimated criminal justice

⁶¹ Baker & Scheye (2007) *Conflict, Security & Development* 517.

⁶² Schärf & Nina *The Other Law* 2.

⁶³ Marks & Wood (2010) *Theoretical Criminology* 313.

⁶⁴ Loader (2000) *Social and Legal Studies* 332.

⁶⁵ Baker (2004) *Society in Transition* 220.

⁶⁶ Baker *Security in Post-Conflict Africa* 35.

⁶⁷ Baker & Scheye (2007) *Conflict, Security & Development* 517.

⁶⁸ 517; 523.

⁶⁹ 517.

framework – and, as argued earlier,⁷⁰ successful incorporation could hold significant advantages for the state.

Now that the issue of whether vigilante incorporation is desirable from a policy perspective has been addressed, the more practical consideration of what oversight of such reform might entail must be canvassed. As regards the role of the state, Baker and Scheye are of the view that it needs to: “license, vet, monitor and regulate justice and security services delivery”; to ensure the accessibility of all to public goods, including security provision; to protect and preserve human rights; and to establish the parameters within which non-state justice and security are provided.⁷¹ This proposal seems to amount to an uncanny mirroring of the objectives of PSIRA.⁷² It would seem that the necessary implication, then, is that only fixed and relatively stable private security groupings – albeit also those operating without profit motives – would be capable of being legitimated by the state. This interpretation is bolstered by the proposed requirement that informal policing groups be licensed. The licensing and vetting of all non-state policing partners so that supervision is possible seems unlikely to be realised in practice, however. It is especially doubtful that spontaneous or once-off vigilante groups could be licensed, even if their members were in theory amenable to incorporation. The inevitable inference seems to be that spontaneous vigilante groups simply fall into the category of private security providers that are incapable of being accepted as (long-term) state partners. At the very least, it is clear that the regulation of informal justice to ensure compatibility with human rights values is no straightforward task.

Be that as it may, those in favour of the incorporation of informal policing are (rightly) unanimous in their view that monitoring is crucial to ensure that “popular punitiveness is not the order of the day” but that groupings are instead steered in the direction of moderate, human rights oriented policing” based on shared goals.⁷³ Clearly, an indispensable component of any state regulation would have to be some type of mechanism

⁷⁰ At § 7 3 1 above.

⁷¹ Baker & Scheye (2007) *Conflict, Security & Development* 520.

⁷² See chapter 7 n 60 above.

⁷³ Marks & Wood (2010) *Theoretical Criminology* 313; 315.

for ensuring accountability. According to Baker, a minimum requirement is an “overarching framework of principles and supervision and an appeal process to reduce inconsistencies and poor performance”.⁷⁴ This supervision prerequisite presents a huge impediment to formalising informal justice. Accountability needs to be monitored, and this requires obtaining clarity about who is responsible for providing informal security services, as well as the resources and political will to supervise them.

Tellingly, beyond recognising the desirability of reforming popular justice so that state and non-state security providers are “in the policing trade together”,⁷⁵ even among those advocating state appropriation of vigilante power there is unsatisfyingly little detail concerning the practical implementation or financial sustainability of the reform of informal policing groups. Baker blithely suggests that the state could form varying partnerships and associations with non-state actors and civil society organisations⁷⁶ to implement a “national strategy of law and order that integrates, regulates, mobilises and empowers all those willing to preserve law and order in an acceptable manner”,⁷⁷ but is largely silent on exactly how to achieve this commendable aim.

Marks and Wood’s proposals are slightly more concrete. Their view is that regulation of the non-state security sector should be anchored at local community level “where harms are experienced most acutely”, rather than via a “centralized policing apparatus”.⁷⁸ They suggest the establishment of local coordinating bodies that, together with the communities they are responsible for, could identify and “map” both security problems and the resources (state and non-state) that could address them. Such coordinating bodies could fall under the auspices of the local government and be tasked with “facilitat[ing] a process of developing a set of principles that will guide the actions and interventions of all policing actors. ... These bodies would become, in a

⁷⁴ Baker *Security in Post-Conflict Africa* 67.

⁷⁵ Marks & Wood (2010) *Theoretical Criminology* 317.

⁷⁶ Baker & Scheye (2007) *Conflict, Security & Development* 519.

⁷⁷ Baker (2004) *Society in Transition* 220.

⁷⁸ Marks & Wood (2010) *Theoretical Criminology* 323.

sense, hubs of accountability and knowledge-sharing.”⁷⁹ Their proposal is worryingly reminiscent of the ideals embodied by community policing, outlined below in § 7 4 1. For various reasons, community policing has hardly been a resounding success.⁸⁰ Whether Marks and Wood’s suggested intervention is to be a local-government-initiated add-on to community policing or a replacement for it, the glaring objection is that it is surely unrealistic to expect the poorly-resourced sphere of local government, that is not even capable of meeting its basic crime-fighting obligations, to be able to form effective partnerships with non-state groupings, let alone actively monitor and regulate them on an ongoing basis once they are in existence.

A cynical but pragmatic conclusion may well be that proper – legitimated, accountable, human-rights-based – vigilante incorporation is an indulgence that a cash-strapped state can ill afford, either economically or as a means of enhancing its legitimacy. Perhaps the only form of incorporation of vigilante groups that is likely to happen often in practice is the state’s *de facto* outsourcing of its popular sovereignty to the community whereby its agents implicitly condone or encourage acts of vigilantism.⁸¹

7 4 State re-legitimation through incorporation: practical examples

In addition to its advantages, some of the many likely challenges of bringing informal modes of security provision under the auspices of formal state justice have been highlighted. Before rejecting the option of vigilante incorporation out of hand as unfeasible, however, it may be useful to examine some existing initiatives aimed at achieving state-community criminal justice partnerships to see whether these could potentially be adapted to accommodate the appropriation of vigilante power. Two options for co-opting vigilantes (and, indeed, other community members too) within the criminal justice system are highlighted below. While they are by no means the only

⁷⁹ 323-324.

⁸⁰ See § 0 below.

⁸¹ Buur “The Sovereign Outsourced” in *Sovereign Bodies: Citizens, Migrants, and States in the Postcolonial World* 211.

viable alternatives, they have been chosen because they represent how non-state agents could be incorporated to help perform each of the two main functions of the criminal justice system, namely policing and the adjudication of disputes.

The first option discussed is community policing (also called community-oriented policing or COP). COP entails formal criminal justice agents (the police) and community members working together to find solutions to local crime and disorder concerns. The second option – restorative justice – involves community members helping to deal with the aftermath of deviant or criminal conduct in order to facilitate the repair of ruptured relationships without blame or retribution. The objective of this section is to establish whether, through using COP and/or restorative justice-based dispute resolution and peace-making, the state could indeed enhance its moral authority and legitimacy by giving away its (traditionally exclusive) policing and adjudication powers to those actually involved in the relevant criminal conflicts, including (potential) vigilantes.

7 4 1 A brief introduction to COP, CPFs and NWs

The first strategy whereby vigilantes could conceivably be co-opted as policing partners is COP. COP's five core elements are service orientation; partnership; problem-solving; empowerment and accountability.⁸² It is an approach that focuses on three main aspects of policing, namely problem-solving policing, CPFs and NW schemes.⁸³ The latter two, with their emphasis on the active involvement of community members, may offer opportunities for vigilante incorporation, so they merit further discussion.

CPF's are one of the most common ways of promoting the concept of COP. In South Africa, the first reference to COP as the prescribed methodology for policing is contained in the Interim Constitution, where

⁸² E Pelser *The Challenges of Community Policing in South Africa* (1999) 4. This analysis was done in terms of the 1997 South African Community Policing Police Framework and Guidelines.

⁸³ Brogden (2005) *Police Quarterly*.

section 221 provides for CPFs in respect of police stations, and notes that their functions include:

- (a) “the promotion of accountability of the [Police] Service to local communities and co-operation of communities with the Service;
- (b) the monitoring of the effectiveness and efficiency of the Service;
- (c) advising the Service regarding local policing priorities;
- (d) the evaluation of the provision of visible police services, including-
 - (i) the provision, siting and staffing of police stations;
 - (ii) the reception and processing of complaints and charges;
 - (iii) the provision of protective services at gatherings;
 - (iv) the patrolling of residential and business areas; and
 - (v) the prosecution of offenders; and
- (e) requesting enquiries into policing matters in the locality concerned.”⁸⁴

The political prerogative informing community policing is clearly one of democratic accountability – to democratise and legitimise the police by enhancing oversight and accountability generally, and particularly by enhancing interaction, consultation and accountability at local level.⁸⁵ This strategy was further codified in the South African Police Services Act 68 of 1995 (“SAPS Act”). According to section 18 of the SAPS Act, SAPS must:

“liaise with the community through community police forums and area and provincial community boards ... with a view to –

- (a) establishing and maintaining a partnership between the community and the [Police] Service;
- (b) promoting communication between the Service and the community;

⁸⁴ Constitution of the Republic of South Africa Act 200 of 1993 s 221(2).

⁸⁵ Pelser *The Challenges of Community Policing in South Africa* 3-4.

- (c) promoting co-operation between the Service and the community in fulfilling the needs of the community regarding policing;
- (d) improving the rendering of police services to the community at national, provincial, area and local levels;
- (e) improving transparency in the Service and accountability of the Service to the community; and
- (f) promoting joint problem identification and problem-solving by the Service and the community.”⁸⁶

The Act also stipulates that the responsibility for establishing CPFs at provincial police stations lies with the Provincial Police Commissioner, who must ensure that CPFs are “broadly representative of the community”, with SAPS members also being represented.⁸⁷ CPFs are central to the COP endeavour, since they are seen as fundamental to building relations between the police and the communities they serve,⁸⁸ ideally providing a means for police and community representatives and organisations to work together “without mistrust and antagonism”.⁸⁹

The other aspect of COP that has practical implications for vigilantism is the establishment of NW schemes. NWs are actually a grassroots “subcategory” of CPFs in that CPFs are developed “from the bottom up”, starting with street committees that form NWs, then sector forums (or sub-forums), followed by the CPF for each station precinct.⁹⁰ NW activities may include patrolling, conducting crime-awareness campaigns and gathering crime-related information, but NW members’ legal rights are the same as those of ordinary private citizens.⁹¹ Their right to arrest suspects without a

⁸⁶ South African Police Service Act 68 of 1995 s 18.

⁸⁷ S 19.

⁸⁸ Anonymous *Civilian Secretariat for Police's Green Paper on Policing* (2013) 37.

⁸⁹ Mr Hanif, former chairperson of the Western Cape Community Policing Board, quoted in O'Regan & Pikoli *Khayelitsha Commission Report* 406.

⁹⁰ See the testimony of the Chair of the Provincial CPF Board at 126.

⁹¹ Kirsch “Violence in the Name of Democracy” in *Domesticating Vigilantism in Africa* 147.

warrant is limited, and following the arrest the suspect must be handed over to police as soon as possible.⁹²

NWs may be legislatively regulated. For instance, the Western Cape Community Safety Act⁹³ provides for the accreditation and support of NWs. A NW is described as a voluntary organisation that operates not for gain with “the purpose of safeguarding its members, their immovable and other property against crime and other safety concerns in the area where the organisation or association operates”⁹⁴ and one of the conditions for accreditation is that it co-operates with the area’s CPF.⁹⁵ If the prescribed criteria for accreditation are fulfilled, a NW may obtain “funding, training or resources” from provincial government.⁹⁶ It is interesting to note that the remit of NWs explicitly includes acting to safeguard “other [by implication non-criminal] safety concerns”. These would presumably overlap with what were defined as instances of first-order dissonance in chapter 4, namely forms of uncriminalised social and moral deviance. The implications of this will be considered shortly, but it is first useful to focus on the strengths and weaknesses of COP.

⁹² See the Criminal Procedure Act s 42, where it is stipulated:

- (1) Any private person may without warrant arrest any person-
 - (a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1;
 - (b) whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;
 - (c) whom he is by any law authorized to arrest without warrant in respect of any offence specified in that law;
 - (d) whom he sees engaged in an affray.
- (2) Any private person who may without warrant arrest any person under subsection (1) (a) may forthwith pursue that person, and any other private person to whom the purpose of the pursuit has been made known, may join and assist therein.
- (3) The owner, lawful occupier or person in charge of property on or in respect of which any person is found committing any offence, and any person authorized thereto by such owner, occupier or person in charge, may without warrant arrest the person so found.”

⁹³ Western Cape Community Safety Act 3 of 2013.

⁹⁴ S 6(1)(a) and (c).

⁹⁵ S 6(5)(e).

⁹⁶ S 6(8).

7 4 2 Critique of COP

The idea behind COP is that policing is “everybody’s business”, with state police and communities needing to work together in partnership to enable policing to reflect local needs.⁹⁷ If successful, COP may enhance state legitimacy, since it provides communities with a “voice and sense of control over the police”⁹⁸ and promotes a sense of shared values between citizens and police based on principles of transparency and inclusivity. COP is aimed at instilling an aspect of “democratic deepening”, since it acknowledges the need for democratic structures such as the police to be open and accountable. Its implementation is a “conscious recognition of the interaction between political democracy and the development of grassroots social institutions that would hold the state to account”.⁹⁹ Policing in partnership with the community could also have the benefit of overcoming the historical mistrust towards and suspicion of the police that is the legacy of many years of “violent, corrupt and indifferent policing”.¹⁰⁰ It is perhaps unsurprising, then, that the policy shift from a philosophy of authoritarian policing to COP is ostensibly keenly promoted in government policing circles in South Africa. For example, the 2013 Green Paper on Policing emphasises that “policing is not something done *to* people, but rather ... something that is done *with* people” and pays lip service to the importance of “a community-oriented approach to policing ... grounded in a social contract between the police and the communities they serve.”¹⁰¹

However, South African community policing in practice has been subject to robust criticism. Brogden’s sceptical view is the “[a]lthough COP might be popular in local rhetoric, delivery of it had little actual substance.”¹⁰² There are various reasons for this.

First, its objectives are hampered in settings such as South Africa where “[a]ffective and democratic links between police and citizen are fragile

⁹⁷ Baker *Security in Post-Conflict Africa* 71.

⁹⁸ Bradford, et al. (2014) *Regulation & Governance* 262.

⁹⁹ D R Gordon “Democratic Consolidation and Community Policing: Conflicting Imperatives in South Africa” (2001) 11 (2) *Policing and Society* 121 127; 137.

¹⁰⁰ Baker *Security in Post-Conflict Africa* 71-72.

¹⁰¹ Anonymous *Short Civilian Secretariat for Police's Green Paper on Policing* 23.

¹⁰² Brogden (2005) *Police Quarterly* 81.

and contingent”¹⁰³ since the underlying premise of COP – namely that well-established links between police and a significant proportion of the population already exist – is absent. Because it failed to take into account “indigenous practices and forms of legitimacy”, argues Brogden, importation of the Anglo-American notion of COP into a transitional society such as South Africa as the cure-all for local crime crises has been a “dramatic, well-funded failure”.¹⁰⁴ In his view, the failure of COP is not simply due to ineffective implementation, but because COP, as borrowed from the West, is simply largely irrelevant to most African societies. Comaroff and Comaroff concur, being of the view that community policing, while being “invoked as a panacea and a prescription in a disordered, violent world ... has little purchase on the hard-edged realities of the new South Africa”.¹⁰⁵

A second problem with COP, highlighted by Marks et al, is that while a community policing narrative remains central to SAPS policy documents and training programmes, it has failed to realise its promise of achieving true police-citizen partnerships. Instead, it has “become focused almost entirely on ways of mobilizing non-state actors to legitimize and increase the effectiveness of the police” rather than being centred on creating horizontal and vertical matrixes between the police and non-state groupings with the aim of having as many security resources and capacities as possible joining forces to make communities safer.¹⁰⁶ In practice, despite rhetoric to the contrary, police do not seem to have the institutional capacity or political will to engage in the innovation needed to properly “empower” communities.¹⁰⁷ COP – chiefly embodied in practice by CPFs – is largely viewed as a symbolic “add-on” to the “other” responsibilities of the police rather than a fundamental transformation in how policing is done.¹⁰⁸ This insight was confirmed in the Khayelitsha Commission report, where it is stated that “the Commission did not get the sense from the individual station commanders that they found their

¹⁰³ Bradford, et al. (2014) *Regulation & Governance* 262.

¹⁰⁴ Brogden (2005) *Police Quarterly* 88; 81.

¹⁰⁵ Comaroff & Comaroff “Popular Justice in the New South Africa” in *Legitimacy and Criminal Justice: International Perspectives* 218-219.

¹⁰⁶ Marks, et al. (2009) *Police Practice and Research* 146-147; 151-152.

¹⁰⁷ Pelser *The Challenges of Community Policing in South Africa* 7.

¹⁰⁸ 9-10.

relationships with CPFs to be deeply valuable for the project of community policing”.¹⁰⁹ Certainly, the commissioners’ overall impression of the workings of the CPFs in Khayelitsha was not positive. Although those who had dealt with CPFs described them as helpful, not even half of survey respondents had heard of CPFs, so this number was less than 10% of the total surveyed.¹¹⁰ CPF members who testified:

“generally painted a picture of organisations whose effectiveness fluctuates, dependent in part on who are the members of the CPF at any given moment, on the relationship with the SAPS leadership at the relevant police station and available resources”.¹¹¹

Political contestation,¹¹² lack of resources and unrealistic expectations regarding the role of CPFs also supported the Commission’s conclusion that CPFs “have not played a significant role in building good relations between SAPS and the community in Khayelitsha”.¹¹³

Third, the concept of “community” in the COP context is also contentious. Pelser disputes whether it is even possible to identify true “communities” with the necessary resources and social capital to implement COP successfully in South Africa’s “highly politicised, divided, hostile and fragmented” townships¹¹⁴ – and in Brogden’s opinion, COP efforts seem to “have simply reinforced schism rather than harmony”.¹¹⁵ The settings where COP tends to be most successful are the “homogeneous, common-interest, wealthy suburbs where it is least needed”.¹¹⁶ In South Africa, middle-class (often white) communities tend to be better able to mobilise the necessary skills and resources resulting in productive partnerships with the police,¹¹⁷

¹⁰⁹ O’Regan & Pikoli *Khayelitsha Commission Report* 411.

¹¹⁰ Mthente survey findings cited at 134.

¹¹¹ 129.

¹¹² According to Fourchard, most CPF chairs in the Western Cape are either DA or ANC activists (Fourchard (2011) *African Affairs* 614).

¹¹³ O’Regan & Pikoli *Khayelitsha Commission Report* 411.

¹¹⁴ Pelser *The Challenges of Community Policing in South Africa* 5-6.

¹¹⁵ Brogden (2005) *Police Quarterly* 81.

¹¹⁶ Brogden (2002) *Liverpool Law Review* 160.

¹¹⁷ D Bruce, G Newham & T Masuku *In Service of the People’s Democracy: An Assessment of the South African Police Service* (2007) 61.

while in the “heterogeneous, lower class urban context where it is most needed”¹¹⁸ the move to rally the community to work with the police has been largely ineffective.

Fourth, even if they are successfully formed, Kirsch argues that CPFs may struggle to gain public acceptance and legitimacy. This is because, in practice, the principles of inclusiveness and transparency underlying the COP model may ironically serve to undermine CPFs’ visible effectiveness in crime prevention, and force them to resort to clandestine tactics to achieve results. Kirsch recounts an instance during his ethnographic fieldwork with CPFs where members of a CPF actually engaged in vigilante action “in order to provide their organisation with legitimacy as a law-abiding, morally righteous and principled organisation”.¹¹⁹ He is of the view that demonstrating effectiveness may require CPF members to actively disregard CPF principles in order, paradoxically, to affirm them publicly.¹²⁰

Taking this critique of COP into account, the possibility of successful “public ownership of policing”¹²¹ in relation to vigilantism – specifically, the potential role of vigilantes in CPFs and NW schemes – nevertheless needs further elucidation.

7 4 3 COP: application to vigilantism

One of the aims of CPFs is to transform and bring together a variety of exclusive legal self-help groups to form one inclusive organisation that is state-endorsed and regulated.¹²² In so doing, they constitute an attempt at “reclaiming state sovereignty by domesticating unregulated forms of vigilantism and order-making”.¹²³ The question to be addressed in this section is whether vigilante groups can indeed transform into a species of

¹¹⁸ Brogden (2002) *Liverpool Law Review* 160.

¹¹⁹ Kirsch “Violence in the Name of Democracy” in *Domesticating Vigilantism in Africa* 155. See 152-154 for details.

¹²⁰ 149.

¹²¹ Brogden (2005) *Police Quarterly* 92.

¹²² Kirsch “Violence in the Name of Democracy” in *Domesticating Vigilantism in Africa* 146.

¹²³ H M Kyed “State Vigilantes and Political Community on the Margins of Post-War Mozambique” in D Pratten and A Sen (eds) *Global Vigilantes: Perspectives on Justice and Violence* (2007) 412.

state-legitimated “bottom-up” community policing, as envisaged by Wisler and Onwudiwe.¹²⁴ Notwithstanding the criticism levelled against COP, it is clear that SAPS is not about to abandon this approach. On the contrary: the Khayelitsha Commission report proposed that trust in the police would be promoted by requiring each police station to make a Community Policing Commitment to its local community, in consultation with the CPF and other interested parties, which would entail, *inter alia*, an undertaking to take their obligation of partnering the community via CPFs and NWs more seriously.¹²⁵ If this ideal could be achieved in practice – which is by no means certain – there is definitely scope for institutionalising vigilante operations as part of COP schemes as one of Fourchard’s “aspect[s] of the dynamic process of state formation”.¹²⁶

As has already been emphasised, vigilantes view themselves as morally upright citizens who fill the crime-fighting breach in ways they believe to be more effective than the protracted and expensive formal justice system in reducing crime and social disorder. They are not revolutionaries or anti-state *per se*. The study by Africa et al mentioned in chapter 4 found that those who support violent collective action are the same individuals who also favour peaceful collective action.¹²⁷ There is good reason to believe that vigilantes’ punitive methods are a strategy that they employ because it is effective, not necessarily because they deem extreme violence to be inherently desirable; thus in theory they should be “reformable”. By being involved in a well-functioning CPF devoted to joint problem-solving, vigilantes and their supporters could have an opportunity to air safety concerns that extend beyond merely criminal matters. In their role as concerned community members they would be well placed to propose innovative and flexible solutions that focus pro-actively on the underlying causes of crime and violence.¹²⁸ Similarly, vigilantes who were incorporated into local NWs would still have scope to express their collective righteous indignation in respect of

¹²⁴ Wisler & Onwudiwe (2008) *Police Quarterly*.

¹²⁵ O’Regan & Pikoli *Khayelitsha Commission Report* 439-440.

¹²⁶ Fourchard (2011) *African Affairs* 627.

¹²⁷ Africa, et al. *Crime and Community Action*.

¹²⁸ V A Clapper & D König “Citizen Participation Through Small Group Activities: The Possibilities for Community Policing in South Africa” (1998) 28 (1) *Africanus* 49 51.

the social evils they encounter on patrol, but would (hopefully) have been educated to use methods to address such evils that did not involve resorting to violent self-help. No longer would community members have to feel that they were the voiceless, marginalised, impotent pawns of an ineffective and centralised criminal justice system. By participating in COP initiatives they could instead be an empowered part of the community safety solution at a local level.

Fourchard's analysis of the various informal anti-crime initiatives on the Cape Flats supports the contention that NWs composed of vigilantism-prone individuals do their job effectively and pose little threat to state legitimacy as such.¹²⁹ His practical observations of the activities of (potentially vigilante but officially state-legitimated) NW groups leads him to conclude that the traits that could in theory be the greatest cause for concern for the state – namely, their inherent violence and the implicit challenge they pose to state authority – are more apparent than real. Technically speaking, the NWs he studied are vigilante organisations, since they use violent punishment to enhance social order, and when the state tacitly appears to permit this¹³⁰ they may be viewed as a manifestation of a local sovereignty. Nevertheless, Fourchard argues that to label NW a vigilante organisation “is to focus on what is exceptional within these organizations”¹³¹ at the expense of recognising that they may have been successfully institutionalised in other respects. While he does not deny that these organisations perpetrate violence, his view is that the “development of a human rights culture has gradually constrained violence”.¹³² Fourchard cites striking examples of routine NW practices illustrating that “rights talk” has become prevalent not just among the elite, but among many sectors of post-apartheid society, including some vigilante organisations.¹³³ He contends that members have become used to complying with human rights discourses and practices due to organisations such as NWs teaching members “how to become good citizens”.¹³⁴ Thus he appears to

¹²⁹ Fourchard (2011) *African Affairs*

¹³⁰ See the example from Fourchard referred to in § 7.3.2 above.

¹³¹ Fourchard (2011) *African Affairs* 625-626.

¹³² 626.

¹³³ 624-625.

¹³⁴ 626.

view NWs as a work in progress, moving gradually but promisingly in the direction of non-violence.¹³⁵

As regards the importance of state supervision and regulation, evidence before the Khayelitsha Commission pointed to the crucial role that the police could play in supporting NWs and other legitimated forms of informal policing to become truly effective. A coordinator of the Violence Prevention Through Urban Upgrading project (“VPUU”) lamented that, while NWs act as a crime deterrent, SAPS does not take them seriously enough, and should work with them more closely.¹³⁶ Likewise, experts testified as to the importance of increased police oversight and support in maximising the efficiency of patrols, as well as in limiting the occurrence of human rights abuses or instances of NWs becoming vigilante groups.¹³⁷ The educative role that the police must play in facilitating a shift away from punitiveness towards adherence to human rights values was also touched on by a Khayelitsha Station Commander, who indicated that he was concerned that NW patrollers sometimes assaulted members of the community: “I have been trying to explain to the patrollers that we must not take the law into our own hands, we are working with the police and we must not do that”.¹³⁸

The perspective that vigilante incorporation via COP is desirable and realisable is certainly idealistic. One might be tempted to reject such an option, since human rights abuses could definitely not be ruled out should vigilantes be incorporated as co-partners in COP. While the possibility of such bodies as NWs degenerating into vigilantism cannot be excluded, it must be remembered that formal policing is itself by no means immune to the tendency to abuse human rights. Indeed, Baker proposes that reform of informal policing groups:

¹³⁵ This account of an increased consciousness of the importance of human rights is supported by evidence before the Khayelitsha Commission. A community activist testified that community members rejected a NW in his area because its members used physical punishment against people who disobeyed its rules (O’Regan & Pikoli *Khayelitsha Commission Report* 111).

¹³⁶ 188.

¹³⁷ 304; 329.

¹³⁸ 226.

“necessitates a corresponding reform of the state police and justice sector. People will not entertain partnerships with state agencies regarded as violent, corrupt, incompetent, and at times complicit with criminal activity. Inadequacy of the state provision will only further entrench the view that state actors are illegitimate”.¹³⁹

It is clear that commitment on the part of police management is a crucial component of the process to create a co-operative policing culture based on human rights values.¹⁴⁰ The state needs to “clean up its own act” – enhance its legitimacy in its own eyes – before any successful legitimization of informal co-partners in security provision can occur. Effective COP requires the state to lead by example, embracing the ideal that the police and the public are co-producers in the eradication of crime and harnessing the dormant potential for organisation¹⁴¹ of all interested community members – including potential vigilantes – in the democratic policing effort.

7 5 “Debrutalising” the punishment of vigilantes: Exploring restorative and restitutive alternatives

In the previous chapter it was argued in favour of flexible, restorative, humane and human-rights-friendly sentencing choices where vigilantism is concerned. This section makes the case that the state’s best hope of re-legitimizing itself vis-à-vis vigilantes is to move beyond the focus on mere exclusion – criminal punishment in the traditional sense of deprivation and the infliction of suffering¹⁴² – by relying instead on forward-focusing restorative justice options as much as possible, with backward-looking incapacitative penalty alternatives being a last resort.

It may be asked why (as was maintained in chapter 6) it is necessary to criminalise vigilantism separately in order to arrive at appropriate sentencing

¹³⁹ Baker *Security in Post-Conflict Africa* 67.

¹⁴⁰ Clapper & König (1998) *Africanus* 60.

¹⁴¹ 63.

¹⁴² Burchell *Principles* 5.

options, if individual judges have in the past shown themselves to be perfectly capable of crafting creative punishment solutions in vigilantism cases.¹⁴³ The reason is that part of the proof required to convict an accused of vigilantism is to show beyond reasonable doubt that their conduct is motivated by the desire to enhance security and order where the state appears unable to perform this function effectively. The implication is that labelling vigilante crimes differently would acknowledge that their underlying dynamics are unlike those of “normal” deviance. As Binns-Ward J evidently appreciated, recognition of this distinction in specific intention between vigilante and non-vigilante crimes forms a convincing justification for a differentiated response in respect of sentencing.¹⁴⁴ If vigilantism were a distinct offence it would not once again be necessary at the sentencing stage to justify a restorative-type flexible sentence for acts of vigilantism, since the need for considering its imposition would already have been demonstrated by the vigilantism conviction itself.¹⁴⁵

But why should restorative-type penalties for vigilantes be preferred above those that advocate retribution, deterrence and incapacitation? Reasons why an over-punitive state orientation is undesirable have been canvassed briefly in §§ 4 2 1 and 6 2 1. Another novel perspective championing an overall shift from state-run retributive punishments to community-based, victim-oriented restitutive and restorative options is that of Nils Christie. Christie is of the opinion that the modern criminal trial in general – and lawyers in particular – “steal conflicts”¹⁴⁶ from victims, who are so “thoroughly represented” that their role is “reduced to the triggerer-off of the whole thing”.¹⁴⁷ He suggests that the victims are:

“a sort of double loser; first vis-à-vis the offender, but secondly by being denied rights to full participation in what might have been

¹⁴³ See § 6 3 2 3 above.

¹⁴⁴ See *S v Dikqacwi and others* para 8, quoted above at § 6 3 2 3.

¹⁴⁵ While this section discusses restorative justice-type solutions in the context of those being sentenced for vigilantism specifically, it is important to remember that the forward-looking, problem-solving rationale outlined below is equally applicable to the majority of community disputes, including ones that tend to trigger vigilantism, such as housebreaking and disorderly conduct.

¹⁴⁶ N Christie “Conflicts as Property” (1977) 17 (1) *British Journal of Criminology* 1 4.

¹⁴⁷ 3.

one of the most important ritual encounters in life. The victim has lost the case to the state.”¹⁴⁸

The centrality of the state and its formal rituals in the criminal justice process deny the victim the opportunity to get to know or understand the offender, meaning that they will “go away more frightened than ever, more in need than ever of an explanation of criminals as non-human”.¹⁴⁹ Offenders also lose by being denied direct participation; not only are they refused the opportunity to justify their misdeeds to their victim personally, to offer them restitution and possibly be forgiven, but they also lose the chance “to receive a type of blame that would be very difficult to neutralise”.¹⁵⁰

Restorative justice – sometimes seen as an embodiment of Christie’s call for parties to a dispute to take back their own conflicts – aims to counter the over-procedural nature of the formal criminal justice system and its tendency to make the offence “more abstracted, more alienated from the actual experiences of the victim, offender and community”.¹⁵¹ Instead, restorative justice aspires to promote direct participation by victim, offender and interested community members alike in the criminal justice process, as opposed to professional experts.¹⁵² The focus is on healing violated or ruptured human relationships, not on punishing offenders for specific incidents.¹⁵³ Restorative justice theory emphasises that each crime has unique circumstances and does not assume that formally equal treatment would necessarily result in a substantively equal outcome. Participants relate to each other “holistically and fluidly as unique individuals.”¹⁵⁴ What

¹⁴⁸ 3. See also J Braithwaite “Building Legitimacy Through Restorative Justice” in T R Tyler (eds) *Legitimacy and Criminal Justice: International Perspectives* (2007) 147, who argues that the professionalisation of justice has gone so far as almost totally to disempower the central stakeholder in crimes, namely the victim. Also A W Dzur & S M Olson “The Value of Community Participation in Restorative Justice” (2004) 35 (1) *Journal of Social Philosophy* 91 92, who say that victims are “largely bystanders in their own cases”.

¹⁴⁹ Christie (1977) *British Journal of Criminology* 8.

¹⁵⁰ 9. Being given the chance to observe the effect of their actions on victims could allow offenders to appreciate the gravity of their wrongdoing, and to take responsibility for it by making amends.

¹⁵¹ Dzur & Olson (2004) *Journal of Social Philosophy* 91.

¹⁵² S M Olson & A W Dzur “Revisiting Informal Justice: Restorative Justice and Democratic Professionalism” (2004) 38 (1) *Law and Society Review* 139 146.

¹⁵³ Schärf “Policy Options on Community Justice” in *The Other Law: Non-State Ordering in South Africa* 47 talking about community justice.

¹⁵⁴ Olson & Dzur (2004) *Law and Society Review* 147.

Braithwaite terms the “legitimacy ideal” for restorative justice is that it “would assist the justice of the law to filter down to the justice of the people and the justice of the people to bubble up to the justice of the law, each checking the abuse of power of the other”¹⁵⁵ – a beautifully-worded way of expressing the interlinked legitimacy benefits of restorative justice for all involved.

Baker’s conception of an ideal dispute resolution process in the African context would also support face-to-face restorative and restitutive solutions to vigilantism. In his view:

“The poor are far less concerned with seeking the offender’s suffering as due punishment, than they are with the suffering of the victim(s) and their recompense. What is required is a process that is flexible, informal, accessible and that puts the community relationships back together again sufficiently for the victim’s family to still be able to live and work alongside the perpetrator’s family without either side having to resort to revenge attacks, or face exile or loss of livelihood ... In ... tight urban and rural communities ..., where neighbours and workmates are in close proximity and have to share their lives together tomorrow morning, the emphasis must always be on restoration.”¹⁵⁶

In respect of vigilantism, resorting to restorative justice instead of harsh sanctions may serve as a possible means of reinstating victims’ voices in the context of a human-rights-focused criminal justice process. In addition, it may function as a critique of the need for private revenge, in that properly implemented restorative justice practices patently demonstrate to participants the advantages of applying non-violent problem-solving skills to community conflicts.¹⁵⁷

Favouring restorative solutions does not mean that there is no place for more coercive measures, however. Braithwaite argues compellingly in favour

¹⁵⁵ Braithwaite “Legitimacy and Criminal Justice” in *Legitimacy and Criminal Justice: International Perspectives* 157.

¹⁵⁶ Baker (2007) *Acta Juridica* 191-192.

¹⁵⁷ See Braithwaite “Legitimacy and Criminal Justice” in *Legitimacy and Criminal Justice: International Perspectives* 157 and § 7.5.2 below.

of a “regulatory pyramid” for understanding and integrating the various approaches to ensuring compliance with the law.¹⁵⁸ According to him, the major theories of compliance – which he identifies as restorative justice, deterrence and incapacitation – are “limited and flawed”, but the strengths of one theory may compensate for the weaknesses of another.¹⁵⁹ According to Braithwaite, “more dialogic forms” of justice must have been tried and have failed before “more dominating, less respectful forms of social control” may legitimately be resorted to.¹⁶⁰ Thus the assumption is that restorative justice options (situated at the bottom of the pyramid) are sufficiently coercive in the instance of the “virtuous actor”; if restorative justice is unsuccessful, deterrence alternatives (positioned in the middle of the pyramid) may be required, assuming the actor is rational; and only in the minority of cases where both restorative justice and deterrence yield no results may incapacitation (placed at the pinnacle of the pyramid) be resorted to, since in such instances the actor is assumed to be incompetent or irrational.¹⁶¹ Applying Braithwaite’s pyramid to the vigilante scenario, there is an expectation that vigilantes – self-styled “virtuous actors” who commit crimes in the name of enhancing social order and community norms – ought to be good candidates for restorative justice-style corrections. If the restorative justice route fails, the “specter of punishment in the background”¹⁶² is still there, and may be utilised, but only on condition that restorative justice options are tried first, then deterrent punishments if those fail, and finally incapacitation only as a last resort.¹⁶³

Overall, it makes sense for the state to explore the possibility of restorative justice before relying on more coercive compliance methods, because restorative justice options are less costly and also more respectful of the human rights of those involved.¹⁶⁴ Using restorative justice options may enhance the legitimacy of criminal justice institutions in various ways. First,

¹⁵⁸ The underlying assumption is that the relevant law is indeed just (J Braithwaite *Restorative Justice and Responsive Regulation* (2002) 30).

¹⁵⁹ 32.

¹⁶⁰ 32-33.

¹⁶¹ 32.

¹⁶² 35.

¹⁶³ 42.

¹⁶⁴ 32.

by favouring inexpensive restorative forms of ensuring compliance the state is being seen not to waste resources that could be better employed elsewhere. Second, by recognising the right of all those who are affected by a crime – including both victim and perpetrator – to participate directly in the criminal justice process, the state is demonstrably treating them in a respectful, humane and non-brutalising manner, thereby abiding by its own claims to be a guarantor of constitutional rights and values. Third, involvement in restorative justice proceedings may help both participants and observers to internalise the values of mutual respect and *ubuntu*, and encourage them to make use of non-violent conflict-resolution methods in their future problem-solving endeavours. Some practicalities of restorative justice penalty options are now considered.

7 5 1 Restorative justice options: Zwelethemba and beyond

Ideally, in line with what has been argued above, if vigilantism is criminalised separately the relevant statute should make provision for restorative justice punishment options unless this would be contrary to the interests of justice – i.e., the presumption should be in favour of restorative justice. Regardless of whether vigilantism is separately criminalised or not, where an accused is convicted of committing a vigilante-type crime the first step should be to establish if such person is a suitable candidate for “community corrections”.¹⁶⁵ Chapter VI of the Correctional Services Act¹⁶⁶ gives offenders the opportunity to “serve their sentences in a non-custodial manner”¹⁶⁷ with the aim of enabling them to lead a “socially responsible and crime-free life during the period of their sentence and in future”¹⁶⁸ as well as rehabilitating them “in a manner that best keeps them as an integral part of society”.¹⁶⁹ Some of the particularly restorative community corrections options include the offender doing community service “in order to facilitate

¹⁶⁵ Correctional Services Act s 50.

¹⁶⁶ S 50-s 72.

¹⁶⁷ S 50(1)(a)(i).

¹⁶⁸ S 50(1)(a)(ii).

¹⁶⁹ S 50(1)(a)(iii).

restoration of the relationship between the sentenced offenders and the community”;¹⁷⁰ paying compensation or damages to victims;¹⁷¹ participating in treatment, development or support programmes;¹⁷² and taking part in mediation between victim and offender or in family group conferencing.¹⁷³ The idea seems to be that punishment – usually a tool for exclusion – may actually serve to incorporate offenders into the community, thus advancing social inclusion. The objectives and methods of such state-initiated community corrections as set out in the Correctional Services Act appear to be well-suited in theory to the conception of restorative and relationship-oriented justice outlined above.

The focus now shifts to a South African example of a non-state-initiated community-based restorative justice model that attempted to achieve these ideals in practice. Its insights and experiences are undoubtedly relevant for vigilante sentencing, but may also hold promise for addressing some of the more general legitimacy and capacity challenges faced by the formal criminal justice system that were highlighted in chapters 4 and 6 above. The so-called Zwelethemba model,¹⁷⁴ run by the Community Peace Programme from 1997 until 2009,¹⁷⁵ was specifically designed to empower poor and marginalised communities to strengthen their security governance capacities.¹⁷⁶ In contrast to the neo-liberal “responsibilisation” strategy of governance¹⁷⁷ whereby the state “steers” and the community “rows”, the Zwelethemba model assumes that the power both to “steer” and to “row” should devolve to communities.¹⁷⁸

¹⁷⁰ S 52(1)(a).

¹⁷¹ S 52(1)(e).

¹⁷² S 52(1)(f).

¹⁷³ S 52(1)(g).

¹⁷⁴ So named after the suburb outside Worcester in the Western Cape where it was developed, “zwelethemba” means “country or place of hope” (Brodeur & Shearing (2005) *European Journal of Criminology* 381).

¹⁷⁵ For more on the success of its methods and values see C Shearing “Transforming Security: A South African Experiment” in H Strang and J Braithwaite (eds) *Restorative Justice and Civil Society* (2001); Brodeur & Shearing (2005) *European Journal of Criminology*; J Froestad & C Shearing “Practicing Justice - The Zwelethemba Model of Conflict Resolution” in Slakmod (eds) *Justicia Restaurativa* (2005); J Wood, C Shearing & J Froestad “Restorative Justice and Nodal Governance” (2011) 35 (1) *International Journal of Comparative and Applied Criminal Justice* 1.

¹⁷⁶ Froestad & Shearing “Practicing Justice - The Zwelethemba Model of Conflict Resolution” in *Justicia Restaurativa* 14.

¹⁷⁷ Discussed at §§ 2 5 2 and 4 2 3 above.

¹⁷⁸ Froestad & Shearing “Practicing Justice - The Zwelethemba Model of Conflict Resolution” in *Justicia Restaurativa* 34-35.

This model aims to resolve conflicts by identifying root causes and focusing on future-oriented solutions¹⁷⁹ within a framework premised on non-violence and creative problem-solving.¹⁸⁰ Achieving security and “doing justice” are seen as mutually interdependent. Peace-creation is understood to be taking place when the effects of a conflict are ameliorated and the likelihood of the conflict continuing or recurring is reduced.¹⁸¹

Crucially, Zwelethemba is not premised on a “bifurcation of the disputants into victims and offenders”.¹⁸² A “crime” construction binary between “victims” and “offenders” is avoided altogether, with the individuals involved in the conflict classified as participants or “parties”.¹⁸³ Conflicts or disputes “are understood as ongoing processes (not past and sealed) in which roles of victim and offender oscillate”.¹⁸⁴ Cases brought before the community-run Zwelethemba “Peace Committees” are:

“no more than a single slice in time that should be located within a history of conflict between the parties. Within this context the ‘offending’ party and the ‘harmed’ party may, and probably do, change places over time. In other words, today’s offender’ may have been yesterday’s ‘victim’. The model that is based on the argument that the language of ‘victim’ and ‘offender’ structures the meaning of what happened in the past in ways that make it difficult for parties involved to understand and articulate their own reality or lived experience”.¹⁸⁵

While the Zwelethemba model for resolving community disputes achieved considerable success in informal settlements and townships across South Africa for a period of a dozen years, involving almost half a million community members in the resolution more than 113 000 disputes ranging

¹⁷⁹ 17-18.

¹⁸⁰ Martin (2010) *Acta Criminologica* 66.

¹⁸¹ Brodeur & Shearing (2005) *European Journal of Criminology* 401.

¹⁸² 380-381; 399.

¹⁸³ Froestad & Shearing “Practicing Justice - The Zwelethemba Model of Conflict Resolution” in *Justicia Restaurativa* 17.

¹⁸⁴ Brodeur & Shearing (2005) *European Journal of Criminology* 399.

¹⁸⁵ Froestad & Shearing “Practicing Justice - The Zwelethemba Model of Conflict Resolution” in *Justicia Restaurativa* 17.

from sexual offences and assault to neighbourhood disputes and property offences,¹⁸⁶ and even being “exported” to communities in South America,¹⁸⁷ it ultimately petered out due to lack of state funding. The Khayelitsha Commission report mourns its loss, noting that after the Department of Social Development terminated the Community Peace Programme funding, hundreds of community members who had been promised compensation for performing their duties as peacemakers were left with “a very bad taste in [the] mouth”.¹⁸⁸ Recognising the Programme’s potential for successfully reducing contact crime, the Commission recommended that a system of community-based mediation to resolve neighbourhood disputes along the lines of the Community Peace Programme be reintroduced in Khayelitsha – this time with the necessary government financial backing.¹⁸⁹

7 5 2 Lessons from Zwelethemba

Although the Zwelethemba model was directed first and foremost at empowering communities to resolve their own conflicts instead of giving them away to others,¹⁹⁰ its methods and values may nevertheless teach the state important lessons in respect of legitimately imposing community-based penalties on vigilantes.

A first insight that is instructive in the vigilante context is the model’s recognition that the categories of “perpetrator” and “victim” are fluid and contested. This is certainly true in communities where vigilantism proliferates. As demonstrated in chapter 5, vigilantes are aggrieved by the state’s labelling them as “criminals” and contend that they are legitimate crime-fighters instead, while deeming those they target for punishment the wrongdoers. To avoid arousing resentment and indignation, the state may be well advised to implement forms of victim-offender mediation for vigilantes and those they

¹⁸⁶ Anonymous “Community Peace Programme” (2009-11-30) *Community Peace Programme* <<http://www.ideaswork.org/>> (2015-09-29)

¹⁸⁷ Froestad & Shearing “Practicing Justice - The Zwelethemba Model of Conflict Resolution” in *Justicia Restaurativa* 38-39.

¹⁸⁸ See discussion in O’Regan & Pikoli *Khayelitsha Commission Report* 302-303.

¹⁸⁹ 452.

¹⁹⁰ See Christie (1977) *British Journal of Criminology* 5, 7.

have harmed that purposely avoid pigeonholing participants as one or the other. Dispensing with the criminal justice dichotomy between good (the victims as represented by the state) and evil (the offender) could pave the way for all parties to appreciate their shared humanity and interconnectedness. Participants would be better empowered to settle their differences and restore their relationships in the spirit of *ubuntu*, recognising that “that which makes others worse off also brings harm to oneself” and that justice requires repairing damage done to both the wrongdoer and the wronged.¹⁹¹

Another insight that may be instructive in bridging the divide between vigilante and peace-making values is the Zwelethemba model’s “forward-looking lens”.¹⁹² The goal is instrumental – to identify root causes of a conflict and reduce or eliminate them to ensure that parties to the dispute can coexist in future without a similar conflict recurring¹⁹³ – rather than to evoke emotions such as remorse or vengeance by harking back to past grievances and punishing them. As has been argued, there is no state imperative for the state to respond purely punitively to vigilantism. According to Binns-Ward J, vigilante violence is not an offence where “if the accused were not committed to direct imprisonment the community’s estimation of the criminal system would be further eroded”. Even the Khayelitsha Commission report only recommends “developing a policing strategy to deal with vengeance attacks”,¹⁹⁴ but does not spell out everything that such a strategy might entail. It is submitted that the wording of the report does not exclude the possibility that the state could – and should – develop and implement restorative rather than (or as well as) retributive approaches to dealing with vigilantism. The state has the opportunity to act innovatively in devising appropriate, creative and individualised penalties for vigilantes that take into account the motivations for vigilante violence and the state’s own culpability in its commission.

¹⁹¹ Baker (2007) *Acta Juridica* 190.

¹⁹² Brodeur & Shearing (2005) *European Journal of Criminology* 400.

¹⁹³ Wood, et al. (2011) *International Journal of Comparative and Applied Criminal Justice* 4-5.

¹⁹⁴ O’Regan & Pikoli *Khayelitsha Commission Report* 456.

An aspect of the Zwelethemba model that the state would do well to emulate in any of its attempts to apply restorative justice to vigilante offences would be its underlying values, as embodied in the Peace Committee Code of Good Practice (the “Code”)¹⁹⁵ that “structures the actions of Peace Committee members in a way that enables them to ‘act out’ the restorative values they are expressing”.¹⁹⁶ There are some similarities between the goals set out in the Code and vigilante objectives: Both seek to “create a safe and secure environment” within communities; members tend to work together as a team rather than as individuals; their procedures are “open for the community to see”; and they are “committed to what [they] do”.¹⁹⁷ The major distinction between the Peace Committee Code and vigilante justice is that the Code specifically states that peacemakers should “work within the law” and respect the Constitution. The Code also eschews violent means of problem-solving, with the aim being to “heal, not to hurt”. “[R]espectful dialogue”¹⁹⁸ rather than coercion is advocated to resolve disputes.¹⁹⁹ Unlike vigilante practices, the Code also emphasises the value of neutrality and fair treatment of all parties to a dispute, upholding the *audi alteram partem* principle.²⁰⁰

While the Zwelethemba model appeared to operate very successfully, it must be conceded that it is doubtful whether any state-instigated restorative justice initiative aimed at vigilantes could achieve the same results. If the formal criminal justice system is involved, any issue reaching a restorative justice forum will already have been defined as a *legal* infraction: a “problem” that is merely being returned to the “community” to be resolved.²⁰¹ The adversarial paradigm of legal discourse deprives participants of the vital freedom to do the “definitional work” of framing the problem themselves by

¹⁹⁵ The complete Code states: “1. We help to create a safe and secure environment in our Community; 2. We respect the South African Constitution; 3. We work within the law; 4. We do not use force or violence; 5. We do not take sides in disputes; 6. We work in the community as a co-operative team, not as individuals; 7. We follow procedures which are open for the community to see; 8. We do not gossip about our work or about other people; 9. We are committed in what we do; 10. Our aim is to heal, not to hurt” (Anonymous “Community Peace Programme” *Community Peace Programme*).

¹⁹⁶ Wood, et al. (2011) *International Journal of Comparative and Applied Criminal Justice* 4.

¹⁹⁷ Anonymous “Community Peace Programme” *Community Peace Programme*.

¹⁹⁸ Wood, et al. (2011) *International Journal of Comparative and Applied Criminal Justice* 2.

¹⁹⁹ Brodeur & Shearing (2005) *European Journal of Criminology* 381.

²⁰⁰ Wood, et al. (2011) *International Journal of Comparative and Applied Criminal Justice* 4.

²⁰¹ Shearing “Transforming Security: A South African Experiment” in *Restorative Justice and Civil Society* 39-40.

engaging in innovative and self-directed “norm-clarification”,²⁰² and instead reduces their status to mere implementers of state agency programmes.²⁰³ This major misgiving notwithstanding, participating in even the most poorly-implemented state-run restorative justice programme must surely be an improvement on being incarcerated in the average South African prison. Prison conditions are notoriously non-conducive to prisoner rehabilitation and reform. Binns-Ward J rightly notes that imposing lengthy periods of incarceration “risks returning to the community damaged, and even more problematic persons at the end of the exercise”.²⁰⁴ A recent Guardian newspaper article quotes crime novelist Maggie Orford as saying,

“We have a prison system that’s completely punitive: it turns violent men into extremely violent men. The gangs run the prisons. It’s almost like a factory of violence and there’s little by way of rehabilitation programmes. It’s like a gulag. People who get out are 10 times worse than when they went in.”²⁰⁵

While there are no accurate statistics,²⁰⁶ the estimated rate of recidivism after being released from South African prisons ranges from 47%²⁰⁷ to 80-94%.²⁰⁸ A forward-looking approach to punishing vigilantes, which includes – where appropriate – utilising future-oriented “community corrections” options such as restorative justice and compensating victims or their families instead of incarceration is thus deserving of wholehearted support.

²⁰² Christie (1977) *British Journal of Criminology* 8.

²⁰³ Shearing “Transforming Security: A South African Experiment” in *Restorative Justice and Civil Society* 39-40.

²⁰⁴ *S v Dikqacwi and others* para 7.

²⁰⁵ D Smith “Calls for Inequality in South Africa to be Tackled as Violent Crime Rises” (2015-10-01) *The Guardian* <http://www.theguardian.com/world/2015/oct/01/south-africa-violent-crime-murders-increase-inequality?CMP=share_btn_fb> (2015-10-01).

²⁰⁶ Although measures to track rates of recidivism are being contemplated in terms of the National Development Plan – see M Masutha “Correctional Services Dept Budget Vote 2015/16” (2015-05-20) *www.gov.za* <<http://www.gov.za/speeches/minister-michael-masutha-correctional-services-dept-budget-vote-201516-20-may-2015-0000>> (2016-08-25).

²⁰⁷ L Law & V Padayachee “Briefing Paper 294: Recidivism” (2012-07-01) *Parliamentary Liaison Office* <www.cplo.org.za/?wpdmdl=2&ind=13> (2016-08-25) 1.

²⁰⁸ V Padayachee “Offender Reintegration – A Restorative Approach to Crime in South Africa” (2008-10-15) *ISS Africa* <<https://www.issafrica.org/crimehub/uploads/Offender-Reintegration-Conference-Report4.pdf>> (2016-08-25) 15.

7 5 3 *An appraisal of vigilante incorporation*

Overall, it is not easy to make a definitive pronouncement on the desirability of state efforts to incorporate vigilante crime-fighting energies formally. Vigilante incorporation is at best a hit-or-miss legitimisation option that is fraught with unpredictability and risk. As regards the possibility of transforming vigilantes into respectable CPF and NW members, in instances where well-organised vigilante groups are keen to make the shift from autonomous to responsible citizenship, they may indeed become a welcome addition to the state's criminal justice arsenal at grass-roots level, thereby boosting state legitimacy. However, it seems quite unlikely that a significant proportion of those who engage in vigilantism would be willing to renounce violence completely and follow the docile problem-solving criminal justice agenda devised for them by the state instead. It is tempting to measure the success of co-opting vigilantes by its outcomes (a reduction in crime being potentially the most significant), while overlooking the means employed to achieve those outcomes. If criminal justice authorities explicitly or implicitly condone human rights abuses perpetrated by "responsibilised" vigilantes-turned-NW-members, this makes a mockery of state claims to be committed to upholding constitutional rights and values and undermines its overall legitimacy. The effective implementation of any partnership between community members and police – be it in the context of COP or a more informal co-opting of vigilante crime-fighting resources – requires a high level of accountability and stringent oversight by formal criminal justice authorities. In practice, holding "incorporated" vigilantes to account and compelling them to abide by human rights standards is unlikely to be feasible in a context where police struggle to perform even their basic functions effectively.

In relation to restorative justice, the discussion above demonstrates that something that is traditionally premised on exclusion and negative labelling, namely criminal punishment, does indeed have the potential to serve an integrative and legitimating function. The best case scenario is that, having been treated in a humane and non-brutalising manner by the state, vigilante (and other) participants in Zwelethemba-style restorative justice programmes would internalise these values of nonviolence and *ubuntu* and

put into practice the peaceful conflict-resolution strategies that had been modelled to them in their future dealings with those they perceive to be deviant. At worst, even if restorative justice initiatives for vigilantes were to play little or no role in changing vigilantes' attitude to violence or fostering a "culture of nonviolence" in the broader community, the state would be legitimating its human-rights-based identity by demonstrating its commitment to "promot[ing] the realisation of a society based on constitutional values"²⁰⁹ in its championing of restorative justice.

In addition to incorporating (*inter alia*) vigilantes as partners in the fight against crime, another way for the state to achieve relegitimation through inclusion would be to delegitimise private violence as an acceptable form of problem-solving interaction; fostering positive community crime-fighting energies and actively discouraging negative and violent solutions to societal concerns are two sides of the same coin. The following section elaborates on the key role that the state may play in epitomising respect for human rights in its dealings with citizens, and the potential for the state's positive example and instruction to filter down to the rest of society.

7 6 Community-focused inclusion strategies: delegitimising the option of private violence

State objectives for restoring its weakened legitimacy should not be confined to attempting to achieve vigilante exclusion or inclusion alone. This section addresses state relegitimation strategies whose primary focus is on making citizens in general less likely to engage in – and support – violent self-help. As has been discussed,²¹⁰ while all acts of vigilantism are triggered by specific instances of perceived deviance, there is a wide range of reasons why particular communities are more vigilante-prone. Many of the factors that lead to vigilantism are matters about which the criminal justice system can do very little – if anything – short-term. In South Africa there are high levels of

²⁰⁹ *S v Dikqacwi and others* para 9.

²¹⁰ See from § 4 2 above.

societal violence, which, it has been argued, are in large part due to inequality, societal polarisation and the consequent marginalisation of the poor. One of the shortcomings of current efforts to tackle the high violent crime rate – including vigilante violence – is that such attempts seldom focus on the social welfare and education interventions necessary to prevent “pre-criminals” at one end of the social stratum from becoming criminals, but instead concentrate on preventing crime from spreading to the privileged areas where those at the other end of the social stratum live.²¹¹ This phenomenon of the “criminalisation of poverty”²¹² is exacerbated by a neoliberal dual policing approach; on the one hand, there is a “zero-tolerance” attitude to policing richer areas²¹³ that is aimed at making crime less visible by containing it in the townships, while on the other, residents of poorer areas are “responsibilised” to participate in COP projects aimed at enhancing street patrols and basically left to police themselves.²¹⁴ The result is that an “isolated and segmented population of ‘true citizens’” is walling itself off from a population that is “marginalized and delegitimized as ‘dangerous criminals’”.²¹⁵ Unless it is possible to address the broader issue of structural violence and the massive divide between rich and poor, which contributes to the pervasive view that physical force is “the primary ... social solution to problems”,²¹⁶ there is every chance that vigilantism will continue to pose a daunting challenge to state legitimacy.

Bringing down levels of social inequality – crucial for reducing a cultural endorsement of violence – is without doubt an expensive and long-term state strategy. It is submitted, however, that initiatives aimed at undoing a punitive mind-set may have some impact in decreasing vigilantism in the shorter term. If, as is contended, high levels of vigilantism are at least partially symptomatic of the overall prevalence of societal aggression, it is crucial that the state devise interventions aimed at reversing the ubiquitous cultural endorsement of violence as a means of tackling societal ills. Any state strategy aiming to

²¹¹ Schubert (2013) *Journal of Peace, Conflict and Development* 45.

²¹² Bénit-Gbaffou (2008) *Journal of Southern African Studies* 106.

²¹³ 104.

²¹⁴ 103-104; 106.

²¹⁵ Schubert (2013) *Journal of Peace, Conflict and Development* 45-46.

²¹⁶ Harris *As for Violent Crime That's Our Daily Bread* 42.

delegitimise private violence as an acceptable form of problem-solving interaction must focus on enhancing the congruency between the (human-rights-friendly) formal legal framework and the (considerably more retributive) popular beliefs (supposedly) sustaining it.²¹⁷

7 6 1 Undoing punitive self-help culture through human rights education

This section discusses the role of education in general – and human rights education in particular – in influencing people’s attitudes towards vigilante violence. Empirical analyses have convincingly established that there is a “strong, positive relationship between formal education and behaviour and attitudes favourable to democracy”, the premise being that education equips people with the skills necessary to understand the intricacies of politics and the rule of law.²¹⁸ These findings extend to punitiveness attitudes too – for instance, a Californian study by Tyler and Boeckmann found that a key predictor of a high degree of punitiveness is a low educational level.²¹⁹ Tankebe’s Ghanaian study of vigilantism set out to determine whether this was true of community support for vigilantism as well – i.e., whether higher levels of educational attainment would lead to a drop in support for vigilantism. He theorised that more educated people would understand that law enforcement was the primary responsibility of the state, and disapprove of those who resort to self-help rather than advocating reform by democratic means.²²⁰ His research did indeed confirm that “increased literacy leads to the development of greater awareness, understanding and tolerance of due process of criminal justice practice and rule of law”, and corroborates the hypothesis that support for vigilantism decreases with higher educational attainment. Tankebe goes so far as to express the view that

²¹⁷ See § 4 3 above.

²¹⁸ Tankebe (2009) *Law and Society Review* 261.

²¹⁹ T Tyler & R J Boeckmann “Three Strikes and You Are Out, But Why? The Psychology of Public Support for Punishing Rule Breakers” (1997) 31 (2) *Law and Society Review* 237 251. See 256-257 for the details of their argument linking higher education with lower levels of punitiveness.

²²⁰ Tankebe (2009) *Law and Society Review* 254.

greater educational attainment “comes close to being a necessary condition for the suppression of attitudes that are supportive of vigilante violence”.²²¹

It would be tempting to dismiss these findings pessimistically as merely confirming the truism that in practice it is only necessary for the disadvantaged and marginalised (who are invariably less educated) to resort to vigilantism, with their penchant for harsh punishments being born of understandable anger, resentment and desperation. By contrast, those privileged enough to have received a good education do not often find themselves in situations where it might be necessary for them to avail themselves of self-help; they therefore feel less desire for retribution and a corresponding lack of empathy – and sympathy – for those who do feel compelled to take the law into their own hands. However, faced with an undeniable empirical link between support for aggressive problem-solving methods (both punitiveness and vigilantism) and lack of education, it would be remiss of the state not to take seriously this avenue for delegitimising the option of private violence.

The ideal would be for the state to make a concerted effort to increase overall academic education levels of all its citizenry, since this would be likely to assist in suppressing people’s eagerness both to legitimate and to resort to vigilante violence.²²² While improving standards of education is undoubtedly a common societal goal, it is one that is proving expensive and protracted. In the meantime, it is proposed that an education programme specifically targeted towards preventing vigilante attacks be implemented as part of a broader human rights education campaign aimed at inculcating a human rights culture at grassroots level.²²³ In this regard, the Khayelitsha Commission recommended that a forum be convened consisting of all relevant role-players – school principals, churches and religious institutions, CPFs, NGOs, community-based organisations, NWs, SAPS managers and researchers – to develop such a public education plan to curb vigilantism.²²⁴

²²¹ 261.

²²² See 261.

²²³ Minnaar “The ‘New’ Vigilantism” in *Informal Criminal Justice* 131; Harris *As for Violent Crime That’s Our Daily Bread* 42.

²²⁴ O’Regan & Pikoli *Khayelitsha Commission Report* 456.

A strategy to teach people about the advantages of the rule of law, the procedural safeguards of the legal system and their importance to democracy is certainly a promising way to change people's attitude to the use of violence for dealing with problems. A study by Africa et al showed that people's attitudes to violent self-help are indeed malleable. A large majority (between 79% and 86%) of even the most activist proportion of their sample (i.e., those who would participate in or support vigilante action) was prepared to "give the use of violence a sober second thought", particularly if respected community leaders endorsed peaceful means of conflict resolution.²²⁵ Significantly, in line with what has been argued throughout this study, their in-depth analysis showed that:

"it is not a case of one group supporting legal action and another illegal methods. There is not some identifiable group of rogue vigilantes which only wants to pursue justice through its own violent methods. Most people do not make a distinction between illegal and legal public responses. Those people who were willing to use force and intimidation were also willing to use more peaceful, procedural and legal avenues."²²⁶

It is hoped that if the public can be properly educated about the reasons for and benefits of extending fundamental rights and freedoms – including due process rights – to even social outcasts and marginal members of society, this will decrease second-order dissonance²²⁷ and make citizens less inclined to fall back on violent means of self-help. Replacing a punitive mentality with a state of mind that acknowledges that "[i]t is only if there is a willingness to protect the worst and weakest among us, that all of us can be secure that our own rights will be protected"²²⁸ would surely assuage the intolerance and retributive sentiments that sustain both participation in, and

²²⁵ Africa, et al. *Crime and Community Action* 33. See also Tyler (2006) *Journal of Social Issues* 323, whose research showed that "people are punitive not because they feel it is an optimal strategy. Rather, they think that the strategies outlined by the procedural justice and restorative justice models are more likely to be effective in reducing the problem of crime. That effectiveness, however, depends on the existence of shared moral values, shared social ties, and feelings of trust, confidence, and obligation towards law."

²²⁶ Africa, et al. *Crime and Community Action* 33.

²²⁷ See from § 4.3.2 above.

²²⁸ *S v Makwanyane* para 88 per Chaskalson CJ.

continued support of, vigilantism. In contrast to a vigilante ideology that is aimed at marginalising, dehumanising and excluding the Other, these sort of attitudes accord with an *ubuntu*-compatible communitarian perspective that highlights social values such as “[g]roup solidarity ... compassion, respect, human dignity, humanistic orientation and collective unity”.²²⁹ The link between *ubuntu* and restorative justice has already been touched on in the context of discussing vigilante punishment options.²³⁰ Suffice it to say that because restorative justice envisages community members as making an indispensable contribution to restorative rehabilitation, participating in restorative justice initiatives may be an apposite means of socialising and sensitising vigilantes and law-abiding citizens alike regarding the need for those who do justice to abide by human rights values, as well as exposing them to non-violent alternatives for resolving disputes and helping equip them to emulate such approaches in future situations of interpersonal conflict.

7 6 2 *Setting a good example*

It is not enough for the state merely to instruct its citizens that forcible self-help is incompatible with human rights, even if this is combined with initiatives empowering them to employ non-violent means of problem-solving instead. In order to obtain the goodwill and co-operation of citizens, the state needs to demonstrate actively that it is worthy of being accorded normative legitimacy. It was contended above²³¹ that it is unrealistic for any state to expect its citizens to recognise the exclusivity of its monopoly on the use of force. Faced with a multiplicity of alternative players in the security market, the best the state can hope for is to instil public confidence in its status as the *preferred* provider of collective security and social order – or at least, to induce citizens to accord it the moral authority to decide how best to allocate the use of legitimate crime-fighting power to others, if it chooses not to

²²⁹ J Mokgoro “Ubuntu and the Law in South Africa” (1998-01-01) *The Ecoport Foundation* <<http://epf.ecoport.org/appendix3.html>> (2015-10-03).

²³⁰ See § 7 5 2 above. See also A Skelton “Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective” (2002) 42 (3) *British Journal of Criminology* 496 for more on the link between restorative justice and *ubuntu*.

²³¹ See § 7 2 above.

exercise such power itself.²³² While it has been argued that an under-resourced criminal justice system cannot be expected to perform sufficiently well to restore citizens' faith in its law-enforcement capacity, it must be remembered that citizen judgments about whether a state is entitled to be obeyed are based on more than merely prudential considerations. As already explained,²³³ a central consideration shaping perceptions of the state as moral, legitimate and deserving of compliance is the fair and respectful treatment of its subjects. If legal authorities relate to citizens in a manner that shows respect for their rights and recognition of their intrinsic worth and human dignity, citizens will be inclined to reciprocate by rendering the formal justice system corresponding respect and recognition. This insight is the reason why all the state re-legitimation strategies suggested above deliberately stress that the state does potentially have the capacity to be legitimated in the criminal justice sphere without needing to compromise its adherence to a constitutionally-based human rights framework. A crucial distinction between state criminal justice mechanisms and their informal counterparts in this regard is that the state – at least in theory – can be held to account for failing to act in a constitutional, responsive and respectful manner in its capacity as security provider. This is important, because only limited power can be truly legitimate.²³⁴

In chapter 5 it was illustrated how vigilante criminal justice rituals frequently mirror those of the state. Because vigilantes appear to be looking to the state for guidance on how to do justice, the state's best chance of enhancing its moral authority may in fact be to demonstrate consistently to vigilantes a criminal justice model that is truly worthy of emulation. By being seen to combine a reasonable degree of efficiency with the desire to prioritise justice over revenge, humanity over brutality, and inclusivity and *ubuntu* over intolerance, the state may re-educate citizens by its own example, thus serving as a positive role-model for the rest of society. A state that puts its human rights culture into practice in respect of its treatment of offenders as well as its day-to-day interactions with ordinary citizens may induce all citizens

²³² Enion (2009) *Duke Law Journal* 525-526.

²³³ See, e.g., § 6 2 3.

²³⁴ See Beetham *Legitimation of Power* 35.

– including (potential) vigilantes – to accede to its resolve to reject the use of violence as a primary means of addressing social problems. If the state can succeed in persuading citizens to give credence to its self-legitimated identity as guarantor of collective security and social order as well as human rights, citizens may indeed be prepared to relegitimate the criminal justice system by refraining from vigilantism, instead entrusting the state with the power to exercise legitimate force on their behalf.

7 7 Conclusion

In this chapter, and the one preceding it, the strengths and pitfalls of exclusionary and inclusionary approaches were weighed up at length, always bearing in mind the state's need to uphold and protect human rights. It was emphasised that, regardless of whether its objective is integration or exclusion, the state has a fundamental duty to exemplify non-violence and respect for human dignity in its day-to-day dealings with all its citizens. The conclusion to the previous chapter argued in favour of human rights compatible exclusionary strategies to enhance state legitimacy in the crime-fighting sphere, including the implementation of procedural justice policing combined with minimal and minimalist policing, and the separate criminalisation of vigilantism.²³⁵ The question was asked whether a state strategy premised on a “plus-sum” legitimacy game, which assumes that vigilante (and wider community) empowerment is not necessarily incompatible with state relegitimation, might not be a preferable approach to chapter 6's “zero-sum” one, which conceived of the enhancement of vigilante legitimacy occurring at the expense of state authority.

This chapter took up that challenge, exploring the feasibility and desirability of co-opting vigilantes' crime-fighting zeal in ways that are compatible with human rights. The spotlight fell on relegitimation attempts predominantly premised on the state resigning itself to the “multi-choice” nature of policing, and finding ways to incorporate or integrate aspects of

²³⁵ See § 6 4 above.

vigilante power in some capacity. It was concluded that harnessing vigilantes to perform policing functions is at best an unpredictable and risky undertaking, since such newly “responsibilised” crime-fighters might not necessarily be prepared to renounce violence, and adequate formal oversight and monitoring of their activities could be unfeasible in practice. Restorative, Zwelethemba-type interventions, aimed at problem-solving rather than policing, were evaluated rather more positively. They were judged to create a setting where the state could demonstrate the non-violent dispute-resolution skills it would prefer its citizens to utilise: Community members (and vigilantes), once they saw how successful such techniques can be, could be persuaded to reconsider their resort to brutal methods. In the process, the state’s legitimacy would be enhanced. This “inclusionary” chapter also highlighted re-legitimation strategies aimed at the wider community – those who, while they may (actually or potentially) sympathise with vigilante aims and methods, are essentially law-abiding. These options focused on ways to “devalourise”²³⁶ the use of private violence by implementing human rights education and promoting restorative approaches to dispute resolution.

Some may denounce as impractical and naïve any state approach to tackling vigilantism whose priority is to educate its citizens by epitomising through its own conduct how citizens should behave in their interactions with fellow-citizens. However, in light of a Constitution that enjoins the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”,²³⁷ it can hardly be deemed unrealistic to expect the state to take these responsibilities seriously by setting a good example in all its dealings with citizens and to hold it to account for failing to do so. While achieving a “virtuous circle”²³⁸ would certainly require formal security providers and enforcers to undergo a change in their values and their way of thinking about their duties, what is certain is that such a paradigm shift is imperative if the aspiration of long-lasting state legitimacy in the domain of criminal justice is to be realised.

²³⁶ Harris *As for Violent Crime That’s Our Daily Bread* 54.

²³⁷ Constitution of the Republic of South Africa, 1996 s 7(1).

²³⁸ See § 6 2 3 above.

8 CHAPTER EIGHT: CONCLUDING REMARKS

8 1 Has this study achieved its aims?

In the same way that acts of vigilantism are triggered by a need to fill the gap between the ideals of formal justice and its concrete manifestations, the present research was sparked by a desire to draw attention to the sizeable gap between the social realities of vigilantism and any legal responses to it. The prevalence of vigilantism, and the significant legal impact of the central issues of law, order, justice and power underscoring it, make it a topic ripe for nuanced and in-depth legal engagement. But has this study done justice to its important subject matter? The time has come to explore the extent to which the aims set out in its introduction have been realised and to outline briefly some of its tentative conclusions.

The first objective of this study was to conceptualise vigilantism as a crime with distinct elements that could be employed in the criminal justice context. Chapter 2 did indeed outline a workable definition of the crime of vigilantism, and in chapters 6 and 7 the case was made for why separate criminalisation is desirable, based on fair labelling and the extent to which such a definition could assist courts in arriving at more appropriately restorative and forward-looking sentences. It was argued that utilising such penalties instead of automatically resorting to punitive measures could help prevent community alienation from the formal criminal justice system, while still expressing the appropriate degree of censure for vigilante violence.

This study's second goal was to establish the nature of the link between weak state legitimacy and vigilantism. In the light of the compelling argument that states – and most particularly fragile ones – almost always lack the ability to justify their claims to monopolise legal violence by effectively guaranteeing social order and collective security, the erosion of state legitimacy was found to be by no means the only factor contributing to the emergence and prevalence of vigilantism. It was concluded that no state can

ever be truly “legitimate” in the sense of having fully addressed all the underlying causes of vigilantism that are within its remit. Nevertheless, a common thread running through many vigilante narratives is that the failure of the police (and other law-enforcement agents) to do their job properly opens a law-and-order gap that vigilantes are ready and willing to fill with their own brand of “justice”. Even on the assumption that some such claims are merely an attempt on the part of vigilante groups to elicit sympathy from potential supporters, it would be unwise to overlook the reality that many acts of vigilantism are a direct response to state inaction.

A third aim of the study was to examine vigilantes’ self-legitimation strategies to ascertain how they are able to garner support from external audiences and to perceive themselves as doers of good rather than evil. The reason for examining this perspective was to emphasise that it would be short-sighted to presume that the state is inevitably by definition the most appropriate body to protect the security interests of beleaguered communities. This study reveals that there are many reasons why people choose to rely on vigilantes in the “multi-choice” policing contest – and their motivations are not always linked to state performance, or lack thereof. In the same way that vigilante justice mirrors state justice in many respects, so, too, there are lessons that the state may learn from vigilante justice. Solutions to problems of order and security need to be affordable and speedy, and offer real, concrete benefits to victims such as respectful treatment and the restoration of property in addition to the ideal of a satisfactory outcome.

In addition, while the administration of formal justice tends to prioritise individual rights to the detriment of communal interests and solidarity, vigilante justice – for all its brutality – epitomises the opposite.¹ The strong undercurrent of communitarianism² evidenced by many acts of vigilantism is admirable – in its aims, if not its method of execution. In communities where vigilantism is ubiquitous, a wrong against one is a wrong against all, and all take responsibility for righting that wrong, rather than handing over ownership

¹ For a striking example, see the community response to a bag thief quoted in § 5.3.1 above.

² An ideology that emphasises collective and societal interests and responsibilities, rather than individual rights.

of the dispute to remote (legal) experts.³ This attitude is poles apart from the notion based on the primacy of individual rights, that typically sees people as purely self-interested, atomistic beings existing outside and apart from society. In dealing with deviance in close-knit communities, the state authorities would be well advised to remember that social obligations, group solidarity and collective unity – not individual autonomy – are viewed as the cornerstone of truly doing justice.

The fourth objective of this research was to come up with – and consider the feasibility of – potential state re-legitimation strategies in response to vigilantism. The potential difficulties posed by attempts to fill the crime-fighting gap with efficient and responsive means of protecting those living in communities that are most vulnerable – both to violent crime itself and to violent self-help solutions – were highlighted in chapters 6 and 7. It was noted that re-legitimation requires the state to demonstrate its capacity to reduce citizen insecurity and fear by dealing sufficiently severely with crime (including vigilantism) while also delegitimizing the option of violent “problem-solving” by exemplifying the merits of human-rights-friendly and respectful criminal justice provision in its dealings with citizens. Available options for excluding and punishing vigilantes were extensively considered, as was the option of educating vigilantes and the wider community about the benefits of due process and the need to uphold human rights. What needs further elaboration are possible state strategies aimed at including vigilantes and winning them over to the extent that they are prepared to re-legitimize the criminal justice system voluntarily.

It was argued earlier⁴ that state re-legitimation depends on the state showing itself to be capable of protecting its citizens whilst still fulfilling its human rights obligations. This delicate balance between efficiency and ideals may be illustrated with reference to the acute tension between law and justice that manifests itself in the vigilante context. From a state perspective, justice is simply the inevitable outcome of the rigorous application of relevant criminal law rules and legal principles to a particular factual scenario. From the point

³ See also Christie (1977) *British Journal of Criminology*.

⁴ At § 7 6 2.

of view of victims and perpetrators of crime – and vigilantes may certainly qualify as both – application of the law cannot simply be equated with doing justice. Instead of being clearly directed at righting wrongs, the criminal justice system's procedures are opaque, its delays unfathomable, and its final pronouncements often at odds with the dictates of common sense and reason. It is small wonder, then, that vigilantes and their supporters perceive the law and its protections to be a stumbling-block to achieving justice. There is no doubt that attempts to tackle vigilante violence at source need to centre on decreasing the dissonance between the ideals of popular and state sovereignty in the criminal justice sphere.

In an ideal world, the state would successfully be able to monopolise core functions such as protecting its citizens against private violence, and in this sense, any vindication of vigilante self-help could be construed as legitimating state withdrawal from a function once considered core.⁵ Realistically, however, the state cannot exercise this central government function alone – either through its own agents or those it authorises to act as its proxies in the crime-fighting arena. There has to be some compromise whereby the state relinquishes some of its absolute power to decide how justice is to be done to those in whose interests it claims to be acting. It is submitted that one way of doing this would be for the state to move away from a purely individualistic paradigm of formal law, and embrace the possibility that there are a myriad of other ways of doing justice that may be more effective and popular than the forms of justice espoused by the state. Indeed, adopting a “spirit of plurality-consciousness”⁶ may sometimes oblige the state to recognise that achieving justice is a communal undertaking that may require little or no formal input. In this regard, argues Connolly,

“the vitality of informal systems may often derive from their grassroots nature – the fact that they represent the particular community in which they are situated. In such cases, excessive government involvement – though necessary to ensure the

⁵ West *Normative Jurisprudence: An Introduction* 195.

⁶ W Menski “Monsters, Legal Pluralism and Human Rights in Africa” in M O Hinz and C Mapaire (eds) *In Search of Justice and Peace: Traditional and Informal Justice Systems in Africa* (2010) 448.

effective functioning of the system – may threaten to undermine the benefits reaped from a community-level process.”⁷

Similarly, Menski criticises what he terms the demonisation of elements of the African culture of doing justice, in the name of protecting human rights. He argues that the central issue is not whether there is a need for traditional and informal justice systems, but rather, “to what extent existing traditional and informal justice systems would be able to assist in achieving better human rights protection on terms set by the people concerned, not provided by some outside interlopers armed with global visions and all sorts of more or less ‘soft’ legal tools.”⁸ The intimation that informal modes of justice might better protect human rights than their formal counterparts might seem counterintuitive. It requires deconstructing and reversing an accepted order that deems the slavish adherence to due process – even at the expense of “factual” justice – to be a value worthy of paramount protection. Surely, however, it is even more unrealistic to expect citizens to be prepared to identify with – and legitimate – a criminal justice system that is not only ill-resourced and riddled with corruption and inefficiency, but also seems to perceive justice to be a purely abstract ideal, the attainment of which is largely unconnected to the lived realities of those whose interests it is meant to serve. If the point of departure of doing (state) justice in marginalised communities were based on shared societal and communal values such as the need for practical reparation, community participation and *ubuntu*, this would surely increase the likelihood of citizen buy-in. As the Zwelethemba experience illustrates,⁹ community members are willing and able to take ownership of their conflicts, and with the proper guidelines in place, their doing so need not be at the expense of basic values such as non-violence and respect for the human dignity of all participants.

⁷ B Connolly “Non-State Justice Systems and the State: Proposals for a Recognition Typology” (2005-2006) 38 *Connecticut Law Review* 239 293-294.

⁸ Menski “Monsters, Legal Pluralism and Human Rights” in *In Search of Justice and Peace: Traditional and Informal Justice Systems in Africa* 452-454.

⁹ See § 7 5 1 above and Shearing “Transforming Security: A South African Experiment” in *Restorative Justice and Civil Society*; M Jenneker & J Cartwright “Mobilising Local Knowledge and Capacity Through Safety and Security” in Slakmond (eds) *Justicia Restaurativa* (2005); Froestad & Shearing “Practicing Justice - The Zwelethemba Model of Conflict Resolution” in *Justicia Restaurativa*; Brodeur & Shearing (2005) *European Journal of Criminology*.

Applying these insights to vigilantes specifically, it must once more be asked whether they are truly “reformable”¹⁰ – i.e., could those prone to violent self-help in good conscience be entrusted with the responsibility of participating in collective projects dealing with social ills in a manner that is congruent with fundamental human rights? The tentative answer to this is, yes. The paradox that vigilantes break the law in order to respect it has long been recognised.¹¹ Although the legal purist may choose to focus on the law-breaking aspect of vigilantes’ conduct, that their actions are motivated by a deep respect for justice and order is equally significant. While vigilantism is undoubtedly an extreme and brutal community-initiated solution to problems of disorder and insecurity, violent self-help, too, has at its core *ubuntu* – fostering the common good by protecting those on whose behalf adherents of self-help claim to act. Vigilante violence is not gratuitous; vigilantes view themselves as essentially peace-loving individuals whose resort to violent punishment is something that must unfortunately be undertaken if they are to fulfil their collective responsibility to achieve and maintain order and security. Research indicates that the same people who are most predisposed to violent collective action are also most likely to engage in peaceful collective action.¹² It is submitted that if non-aggressive, Zwelethemba-style methods were demonstrably sufficient to realise vigilante aims, a large proportion of vigilante-prone individuals would actively choose such alternatives, rendering the resort to violent self-help redundant. While it would be too optimistic to hope that vigilantism could ever be completely eliminated in marginalised communities where violence is rife, it seems possible that vigilantes might be willing to reform sufficiently to legitimate – and work in partnership with – a formal justice system committed to addressing issues of crime and disorder in a community-responsive and inclusive, reintegrative, restorative and respectful manner.

¹⁰ Baker *Security in Post-Conflict Africa* 66.

¹¹ Abrahams *Vigilant Citizens* 153.

¹² See § 7.6.1 above.

8 2 Future research possibilities

A primary objective of this study was to employ legitimacy as a means of weaving together the disparate strands of vigilantism literature into a theoretical rope strong enough to string up a lynch mob victim. While it is contended that legitimacy has indeed been shown to be a persuasive framework for understanding vigilantism, particularly in respect of bringing together social science and law-related aspects, it is recognised that vigilantism is nevertheless still under-theorised and under-researched.¹³ Without adequate empirical confirmation, this study's conclusions amount to no more than tentative suggestions. Future research, both quantitative and qualitative, in social sciences such as criminology may yield significant insights, for example into the following: The factors precipitating groups' transformation from state-sanctioned community crime-control initiatives into vigilante groups, and *vice versa*; the relationship between vigilante groups' internal organisation and chosen strategies and their ability to achieve legitimisation through mass mobilisation; and the comparative wisdom and practical feasibility of the various state re-legitimation options proposed in chapters 6 and 7. Suggestions, such as the one that allowing community members to take ownership of their conflicts with minimal state intervention has a better chance of enhancing state legitimacy and reducing vigilantism than if CPFs were the chief community-police partnership strategy, could readily be tested and their accuracy verified. For example, a study on whether there was a reduction in vigilantism in marginalised communities where Zwelethemba initiatives were successfully implemented (possibly with similar communities using CPFs only as a control group) could be useful in evaluating whether reviving community peace projects would truly be a worthwhile measure to use in combating vigilantism. In addition, this study – while advocating Zwelethemba-style interventions to advance communitarian justice ideals – does not consider alternative options, such as community

¹³ For examples of vigilante-specific quantitative research, see Tankebe (2009) *Law and Society Review*; Jackson, et al. (2013) *Psychology, Public Policy, and Law*. For qualitative research, see Buur, e.g., Buur (2006) *Development and Change*.

courts¹⁴ or more state-initiated restorative justice,¹⁵ in any great detail. All the various responsabilisation alternatives need to be compared, and their strengths and weaknesses evaluated, before it can be argued convincingly that community peace programmes are more beneficial than other non-violent informal justice solutions.¹⁶

From a legal point of view, an issue related to criminal law that is not addressed here is the question of whether restorative justice sentencing options – if resorted to in the vigilante context, as is proposed – would be viewed as appropriate for all types of crime, or whether their purview might have to be limited to minor offences. There is already controversial judicial authority to the effect that restorative-type penalties are not appropriate for serious offences such as rape.¹⁷ Considering states' notorious reluctance to relinquish jurisdiction over criminal matters in any event,¹⁸ it would be useful to establish whether it is likely that there would be a similar unwillingness to allow non-state forms of criminal justice to apply vis-à-vis vigilantism-related misdeeds, particularly when it comes to deciding on appropriate punishments. As regards implementing recommendations such as criminalising vigilantism as a separate offence, this must be undertaken by parliament. Creating awareness of the potential advantages of such a move is as much as this research can hope to achieve.

¹⁴ For more on the benefits of community courts, see Schärf "Policy Options on Community Justice" in *The Other Law: Non-State Ordering in South Africa*; Bidaguren & Nina (2004) *Social Justice* 175-177; Seekings (1992) *South African Review of Sociology*; and G Pavlich "People's Courts, Postmodern Difference, and Socialist Justice in South Africa" (1992) 19 (3) *Social Justice* 29.

¹⁵ E.g., E Elliot & R M Gordon *New Directions in Restorative Justice: Issues, Practice, Evaluation* (2005); E Van der Spuy, S Parmentier & A Dissel *Restorative Justice: Politics, Policies and Prospects* (2008); D Roche "Restorative Justice and the Regulatory State in South African Townships" (2002) 42 *British Journal of Criminology* 514.

¹⁶ For more on the benefits of non-state justice alternatives, see Connolly (2005-2006) *Connecticut Law Review*.

¹⁷ In *DPP v Thabethe* 2011 2 SACR 567 (SCA), the SCA rejected restorative justice as a viable sentencing option in a case of the rape of a family member, overturning the High Court judgment (*S v Thabethe* 2009 (2) SACR 62 (T)) that had imposed a wholly suspended sentence with restorative elements such as community service and paying reparation to the victim and sentencing Thabethe to ten years' imprisonment instead.

¹⁸ Connolly (2005-2006) *Connecticut Law Review* 293.

8 3 Final thoughts

Although vigilante and state modes of administering justice have generally been evaluated in contrast to each other, their exercise of power and legitimation strategies have much in common. Abrahams is correct that they are both in their own way capable of fostering the well-being of all as well as the interests of a select group – and frequently mistaking one for the other. Likewise, each exercises power in ways that protect as well as repress those on whose behalf it claims to be acting. The endeavours of either can result in serious miscarriages of justice, and each at times claims to be providing a public service in order to disguise less noble aims. All in all, both “seem to serve some of their avowed purposes and at the same time to be full of dangerous potential”.¹⁹ Despite these similarities, each has strengths that the other lacks. Maybe the best of both worlds would be to find a way to unite informal justice’s accessibility, informality, low cost, speed and the fact that its legal norms are familiar to those it serves, with formal justice’s impartiality and predictable, uniform rules and procedures.²⁰ As is evident from this study, however, successful state appropriation and incorporation of vigilante crime-fighting fervour is a far from straightforward undertaking. The best that one can realistically hope for, says Abrahams, is that vigilantism and state justice may occasionally “positively combine their virtues and counteract each other’s faults rather than simply compound them”.²¹

At the conclusion of this research, the author is left with a sense of profound ambivalence in respect of vigilantism. This is unsurprising, perhaps, given that it is its elusive, enigmatic nature, its “twilight” quality, that makes vigilantism such a compelling subject of study. What may nevertheless be claimed with relative certainty is that vigilantism, in challenging the formal boundary between crime and punishment, is symptomatic of a wider citizen inclination to call into question the accepted *status quo* in respect of state-citizen power relations. Vigilantes’ willingness to empower themselves by representing their violent self-help as a legitimate alternative means of

¹⁹ Abrahams *Vigilant Citizens* 170.

²⁰ Connolly (2005-2006) *Connecticut Law Review* 247.

²¹ Abrahams *Vigilant Citizens* 170.

punishing deviance – often to the detriment of state legitimacy – “exemplifies the extent to which the legitimacy of political authorities has been eroded and popular consent to be governed withdrawn”.²² State claims to be the “predominant form of polity”²³ appear to have weakened to the point that some call for a move away from a notion of *de iure* sovereignty, which has its ontological foundation “in formal ideologies of rule and legality”, in favour of a *de facto* perspective on sovereignty that sees the right to exercise power as “a tentative and always emergent form of authority grounded in violence that is performed and designed to generate loyalty, fear, and legitimacy from the neighborhood to the summit of the state.”²⁴ By identifying vigilantism as a potent illustration of the precariousness of the state’s hegemony of (criminal justice) power, this study has highlighted the value of focusing legal attention on this paradoxical manifestation of crime as punishment.

²² A Edwards & G Hughes “Introduction: The Community Governance of Crime Control” in G Hughes and A Edwards (eds) *Crime Control and Community: The New Politics of Public Safety* (2002) 3.

²³ Abrahams *Vigilant Citizens* 171.

²⁴ Hansen & Stepputat (2006) *Annual Review of Anthropology* 296-297.

A. APPENDIX A: VIGILANTES' INTERNALLY-DIRECTED COUNTER-LEGITIMATION

i. Introduction

Chapter 5 deals with ways used by vigilantes to justify their power to external audiences and their strategies to undermine state legitimacy. However, it leaves vigilantes' inner-directed modes of self-legitimation unexplored. Barker¹ observes that many of the self-legitimation rituals of those in power are inward-turning, serving to impress the self rather than those around them. In this sense, legitimation may be viewed as an activity carried out by the powerful for their own benefit to justify the "deservedness" of their exercise of authority in their own eyes. The power exercised by vigilantes in carrying out often atrocious acts of violence seems irreconcilable with their maintaining the moral high ground,² being convinced of the "rightness" of their own authority. It is necessary to understand how vigilantes are able to maintain that their own conduct is not an aberration from their otherwise blameless lives, but is instead completely consistent with their self-identity as morally upright, law-abiding citizens who are simply doing their duty by protecting the community from harm.

ii. Relevant criminological explanations for vigilantism

There are a number of criminological frameworks that may help to explain how vigilantes can maintain their self-concept as "good" people whilst still engaging in deviant acts. Baker³ identifies several such criminological theories: The first of these is *anomie theory*, which postulates that where people are unable to gain access to socially created needs through legitimate behaviour, they will resort to alternative means, including deviant and criminal

¹ Barker *Legitimizing Identities*.

² See Minnaar "The 'New' Vigilantism" in *Informal Criminal Justice* 121.

³ See Baker (2002) *Journal of Contemporary African Studies* 224-225.

activities.⁴ Thus anomie theory would characterise vigilantism as a necessary form of deviance by which the cultural goal of protection from disorder and crime may be attained in circumstances where the approved means of relying on state policing is ineffective or unavailable. A second relevant theory is *labelling theory*, which notes that certain forms of behaviour – especially elements of the behaviour of the poor and disadvantaged – are not inherently deviant, but are branded as such by the powerful. These new definitions are imposed on the powerless against their will. In accordance with labelling theory, vigilantism may be seen as a long-standing and popularly accepted practice that has now merely been labelled as criminal by the elite. A last criminological explanation Baker highlights is *social control theory*. This perspective says that restraints on people's behaviour may break down under certain circumstances, including during periods of rapid social change when it is not possible for new forms of regulation to evolve quickly enough to replace the declining force of social integration. It might be argued that corrupt, under-resourced and inefficient state policing could indeed make it impossible for a state to inculcate the rule of law, enabling people to justify taking the law into their own hands. Other criminological explanations that have been applied to vigilantism include *conflict theory*,⁵ *self-help theory*,⁶ and *attribution, symbolic interaction and equality theories*.⁷

⁴ In her testimony before the Khayelitsha Commission, Prof Godobo-Madikizela perceived anomie as a helpful tool for understanding patterns of crowd behaviour. She defined anomie as situation where there is a breakdown in social and cultural norms – “the erosion of moral codes that often support a society's stability and moral framework means that no common principles or values govern behaviour” – which may be fostered by a failure to enforce rules (O'Regan & Pikoli *Khayelitsha Commission Report* 345). This understanding of the role of anomie seems akin to Baker's social control theory explanation (see below).

⁵ Supancic & Willis (1998) *Journal of Crime and Justice*. According to this approach, social order is heterogeneous, with various groups competing for power. Since the state and its legal apparatus serve the current economic order and its elite, political and ideological measures are used to define actions threatening the economic order as deviant, singling out marginal members of society for the most repressive sanctions. Economic crises and inequality may precipitate an increase in the need for legal justice, and where the formal justice system founders for control, it may tend to be supplemented by extra-legal justice such as vigilantism.

⁶ W Austin “Fieldnotes on the Vigilante Movement in Mindanao: A Mixture of Self-Help and Formal Policing Networks” (1988) 12 *International Journal of Comparative and Applied Criminal Justice* 205, who bases this view on Baumgartner (1984).

⁷ J Neapolitan “Vigilante Behavior and Attribution Bias” (1987) 14 *Criminal Justice and Behavior* 123. Attribution theory would explain how individuals who identify with the original victim of crime, rather than the perceived offender, would be more likely to support and engage in vigilantism (125). Symbolic interactionism helps clarify why if the victim of vigilante behaviour is not identified with, vigilantes will be less likely to justify the victim's behaviour, but will rather justify their own (125-).

In exploring the macro-level triggers of vigilante violence, each of these criminological theories gives some insight into vigilantism. However, none of them is a complete or satisfactory explanation for vigilantes' sense that what they are doing is right and in conformity with social values, rather than deviant. Models such as the anomie, self-help, conflict, equality and social control theories might help explain why a particular society or community within a particular society might be more prone to deviance, and even to vigilantism, but they do not clarify why specific community members might choose to engage in vigilantism and others not, or how those that do so are able to justify their behaviour to themselves. Anomie theory also fails to explain why vigilantes, who are in all other ways conforming members of society, would engage in this particular type of "deviant" and "criminal" behaviour. And while labelling theory correctly recognises that informal policing is branded as a crime simply because it is non-state-sanctioned, it would be irresponsible and unrealistic simply to write off state criminalisation of vigilante torture and extreme violence as a form of unfair labelling.⁸ The most important objection to all these criminological theories is their point of departure: that vigilantism is a species of anti-social behaviour, and that those who engage in it can be lumped together with all other deviants regarding the underlying motivations for their actions. A basic assumption of the present study, in contrast, is that vigilante violence can only be explained convincingly by taking it "out of the realm of the exotic":⁹ It cannot simply be accounted for with reference to conventional theories of deviance, since its dynamics and fundamental rationale are unlike those of most other forms of criminal behaviour.

126). Neapolitan's overall conclusion is that "vigilante behavior and approval of such behavior is quite likely based in part on perceptions and attributions that result from a biased subjective construction of reality" (136).

⁸ See also Baker (2002) *Journal of Contemporary African Studies* 224-225 for more critical analysis of the three theories utilised by him.

⁹ Huggins *Vigilantism and the State in Modern Latin America* 13-14.

iii. Relevant psychological explanations for vigilantism

Now that some of the criminological explanations for vigilantism have been canvassed, two possible theoretical perspectives on vigilantism which focus on the individual who is involved in an act of collective vigilantism from a psychological – as opposed to a criminological – perspective will be highlighted.¹⁰ The first of these is the *theory of deindividuation*. It hypothesises that various factors such as anonymity, loss of individual responsibility, arousal or sensory overload may lead to a loss of inner restraint. The weakening of controls based on guilt, shame and fear may lead to antisocial “deindividuated”, “antinormative” (deviant) behaviours that are impulsive, irrational, emotional and intense.¹¹ The actions of the vigilante mob may be explained as a manifestation of this deindividuation process. An alternative explanation for crowd violence is the *social identity theory*.¹² According to this model, deindividuating settings do not lead to a loss of personal identity, as the deindividuation theory would suggest; rather, they can facilitate a transition from a personal to a more collective identity.¹³ The seemingly “antinormative” behaviour displayed by group members is simply a result of the shift from to a self-image based on group membership instead of on personal identity, resulting in their conforming to the local norms of that group or situation, rather than being restrained by their personal inhibitions.¹⁴

It is submitted that social identity theory is a more persuasive hypothesis for explaining the mindset of a vigilante in action than is the deindividuation theory, since it allows for the possibility that vigilantism is underpinned and regulated by a morally coherent foundation that its

¹⁰ These were identified in Prof Godobo-Madikizela’s testimony before the Khayelitsha Commission (O’Regan & Pikoli *Khayelitsha Commission Report* 342-345); see also P Godobo-Madikizela “The Dynamics of a Traumatized Community: Understanding Crowd Violence and its Aftermath” (1996) 4 (2) *Psycho-analytic Psychotherapy in South Africa* 1.

¹¹ See T Postmes & R Spears “Deindividuation and Antinormative Behavior: A Meta-Analysis” (1998) 123 (3) *Psychological Bulletin* 238 239; N Kugihara “Effects of Aggressive Behaviour and Group Size on Collective Escape in an Emergency: A Test Between a Social Identity Model and Deindividuation Theory” (2001) 40 *British Journal of Social Psychology* 575 576; A Silke “Deindividuation, Anonymity and Violence: Findings From Northern Ireland” (2003) 143 (4) *Journal of Social Psychology* 493 493 and the authorities cited there.

¹² More correctly termed the Social Identity Model of Deindividuation Effects, or SIDE – Kugihara (2001) *British Journal of Social Psychology* 576.

¹³ Postmes & Spears (1998) *Psychological Bulletin* 254.

¹⁴ Kugihara (2001) *British Journal of Social Psychology* 577; Postmes & Spears (1998) *Psychological Bulletin* 254.

adherents use to legitimise and justify their actions. Deindividuation theory would seem to paint vigilante violence as “mindless, antinormative and disinhibited” – i.e., it overlooks that vigilantism may be the product of legitimate grievances – whereas social identity theory recognises that to the group engaging in an act of vigilantism, their behaviour is “rational and normative and has its limits”.¹⁵ Far from being senseless, such vigilantism is based on group norms and a joint purpose (identified by Godobo-Madikizela as a “deep need for social justice”)¹⁶ that propels vigilantes into action, using collectively-sanctioned violence as the means to achieve their aim. Of the theories examined so far, social identity theory appears to be the only approach that could account for vigilantism’s status as “moralistic crime”, where the role of victim and offender are reversed in the eyes of the perpetrator.¹⁷ However, even social identity theory fails to explain why some community members get swept up in the identity of the crowd and others are immune to its allure. In focusing on the behaviour of individuals in crowd settings, social identity theory also downplays personal agency and the need for internal self-legitimation.

iv. Neutralisation theory and vigilante internal self-legitimation

If the focus is purely on vigilantes’ need to portray their actions to others – but more importantly to themselves – as congruent with a morally upright and law-abiding self-concept, the most persuasive criminological framework for endogenous self-legitimation of vigilantes’ particular “deviance” is perhaps Sykes and Matza’s *neutralisation theory*.¹⁸ Sykes and Matza contend that, prior to committing deviant acts, offenders¹⁹ utilise certain techniques that enable them to justify departure from societal norms, making

¹⁵ Postmes & Spears (1998) *Psychological Bulletin* 254.

¹⁶ O’Regan & Pikoli *Khayelitsha Commission Report* 343.

¹⁷ Black “Crime as Social Control” in *Towards a General Theory of Social Control Volume 2: Selected Problems* 12.

¹⁸ G Sykes & D Matza “Techniques of Neutralization: A Theory of Delinquency” (1957) 22 *American Sociological Review* 664.

¹⁹ These could be single perpetrators as well as those who act as part of a group; thus unlike social identity theory, neutralisation theory could account for the reasoning process of lone vigilantes as well as those who act in concert with others. Sykes and Matza’s focus is specifically on young offenders (whom they term “delinquents”) but their insights could be applied more generally too.

deviance possible by rendering norm violations “‘acceptable’ if not ‘right’”.²⁰ Significantly, they observe that neutralisations “represent tangential or glancing blows at the dominant normative system rather than the creation of an opposing ideology; and they are extensions of patterns of thought prevalent in society rather than something created *de novo*”.²¹ There is indeed empirical support for Sykes and Matza’s claim that those who are more likely to employ neutralisations display high levels of societal attachment and are essentially still bonded to society: they tend to be committed to conventional and pro-social beliefs, despite their offending.²² These findings are entirely in line with the contention outlined in § 3 4 1 above that vigilantism does not directly undermine the state’s legal legitimacy, being the action of a “conservative mob”²³ rather than a display of outright rebellion. It also substantiates the argument posed in § 5 2 1 that vigilantes legitimate their power with reference to ideologies, values and rituals that are central to the mainstream cultural ethos. From a criminal law perspective, too, it will become clear that many neutralisations correspond closely with existing legal defences, confirming yet again the uncanny resemblance between a posited vigilante mindset and practices, and the formal criminal justice process. Indeed, Sykes and Matza’s central hypothesis is that “much delinquency is based on what is essentially an unrecognized extension of defenses to crimes, in the form of justifications for deviance that are seen as valid by the delinquent but not by the legal system or society at large.”²⁴

Sykes and Matza’s premise is that neutralisation makes deviant behaviour possible by “deactivating” the social controls that restrain criminal behaviour, a process Bandura terms “selective disengagement of self-

²⁰ Sykes & Matza (1957) *American Sociological Review* 667. It is acknowledged that the process of neutralisation itself is very difficult, if not impossible, to validate. The theory assumes that offenders are enabled to commit crimes because they employ neutralisation techniques prior to offending, but “[n]o-one has yet been able to empirically verify the existence of preevent neutralizations. In fact, neutralization theory depends on postevent accounts by the offender” (P Cromwell & Q Thurman “The Devil Made Me Do It: Use of Neutralizations by Shoplifters” (2003) 24 *Deviant Behavior* 535 547). This does not detract from the argument that neutralisation is an attractive framework for explaining why a person may endorse pro-social values whilst simultaneously violating them.

²¹ Sykes & Matza (1957) *American Sociological Review* 669.

²² R Agnew “The Techniques of Neutralization and Violence” (1994) 32 (4) *Criminology* 555; H Copes “Societal Attachments, Offending Frequency and Techniques of Neutralization” (2003) 24 (2) *Deviant Behavior* 101.

²³ Abrahams *Vigilant Citizens* 4.

²⁴ Sykes & Matza (1957) *American Sociological Review* 666.

sanctions”.²⁵ The primary function of neutralisation is to avoid cognitive dissonance²⁶ by “mitigating the genuine guilt or tension resulting from the conflict between inconsistent self-images – that of the upright citizen and that of the social deviant”.²⁷ Sykes and Matza identify several neutralisation techniques that are especially relevant for present purposes.

First, vigilantes may employ *denial of the victim*, whereby they take responsibility both for causing harm and injury, but neutralise the injury caused as amounting to rightful retaliation or deserved punishment. As already discussed, vigilantes perceive themselves to be “purifiers of society, restorers of order, avengers of wrong”, thereby transferring blame to the targets of their violence. They are assisted in this endeavour to transform their victim into a wrongdoer by their steadfast belief that the target of their violence is indeed the perpetrator of some wrongdoing. Thus it is relatively easy for vigilantes to label their victims as less-than-human outsiders who merit elimination. This further erodes vigilante-victim empathy, thereby facilitating the violence perpetrated.²⁸

Relating this neutralisation technique to available criminal law defences, it is apparent that “denial of the victim” may overlap with the ground of justification of private defence discussed in chapter 2. The reason that it is not contrary to the legal convictions of the community to use reasonable force to ward off an unlawful attack is because the victim “had it coming to them” in the sense that they were the initial aggressor whose attack it was necessary to repel – a clear example of state-endorsed reversal of the roles of perpetrator and victim. In chapter 2 it was explained why vigilantes would find it hard to justify their conduct as lawful on the basis of having acted in private defence. Nevertheless, despite vigilantes’ not meeting all the legal requirements for this defence, transforming the victim into “a person deserving

²⁵ A Bandura “Selective Activation and Disengagement of Moral Control” (1990) 46 *Journal of Social Issues* 27 28.

²⁶ S Eliason & R Dodder “Techniques of Neutralization Used by Deer Poachers in the Western United States: A Research Note” (1999) 20 *Deviant Behavior* 233.

²⁷ M Hazani “The Universal Applicability of the Theory of Neutralization: German Youth Coming to Terms With the Holocaust. An Empirical Study With Theoretical Implications” (1991) 15 *Crime, Law and Social Change* 135 136.

²⁸ See Bandura (1990) *Journal of Social Issues*.

injury”²⁹ is an integral component of vigilante violence, and this neutralisation strategy may be viewed as an extension of private defence in that sense.

A second neutralisation technique applicable to vigilantism is *condemnation of the condemners*, which Sykes and Matza note may be of particular importance when directed towards those “assigned the task of enforcing or expressing the norms of the dominant society”³⁰ – the police, for example. By characterising their acts as done in reaction to state inaction, incompetence or blatant wrongdoing, vigilantes do indeed attempt to shift the focus from their own violence to the reprehensible behaviour and motives of those who denounce them, thereby downplaying or repressing the blameworthiness of their own behaviour. In emphasising criminal justice system failings they deflect the negative sanctions attached to their own norm-violation back to law-enforcers.

Although there is not a particular criminal defence that is comparable to this neutralisation technique, judges do sometimes take judicial notice of these types of considerations when deciding on appropriate punishments. An example of this is the perspective of Binns-Ward J in the sentencing judgment of *S v Dikqacwi*:

“The commission of the crimes is a manifestation of a broad problem affecting a large section of South African society, notably those living in the widely impoverished, densely populated and under-resourced townships in our cities like Khayelitsha and Philippi, that is of persons in communities taking over and carrying out themselves the functions *that in a properly functioning society would be discharged by the criminal justice system – the police and the courts*. ... On reflection, even if wholly unacceptable, *this much is understandable in the context of a perception by a community that the formal and constitutionally established criminal justice system is not functioning*.”³¹

²⁹ Sykes & Matza (1957) *American Sociological Review* 668.

³⁰ 668.

³¹ *S v Dikqacwi and others* paras 4; 6 (emphasis added).

It is submitted that there are instances where it is eminently understandable for vigilantes to feel that their condemners – the state – are worthy of censure, and this perspective deserves legal recognition. While the immediate function of this technique may be the (self-serving) one of ensuring that the wrongfulness of vigilantes' own behaviour "is more easily repressed or lost to view",³² its utilisation nevertheless serves as a reminder that resorting to vigilantism is in essence a response to something – that "something" being state inadequacy.

A third neutralisation technique is the *appeal to higher loyalties*, whereby internal and external social controls are neutralised "by sacrificing the demands of the larger society for the demands of the smaller social groups to which the [perpetrator] belongs".³³ Sykes and Matza emphasise that failure to follow the imperatives of the dominant normative system does not necessarily imply that perpetrators repudiate such norms; rather, they simply decide that other norms are more pressing and choose to follow them instead.³⁴ Vigilantes do indeed minimise blameworthiness by prioritising the collective security interests of a particular community or group over the demands of society at large – giving precedence to (local) "order" over (national) "law". Potential vigilantes are well aware that murder is against the law, for instance, and would no doubt agree that it should be criminalised, but even so, when a neighbour shouts, "Thief!" they may have no qualms about helping to beat a suspected housebreaker to death. This loyalty to the communal group may also help explain why those living in vigilante-prone communities choose not to inform the police about vigilante activities: they deem it more important to demonstrate allegiance to local community members than to assist the police in their inquiries. This aspect of community loyalty is also recognised by Binns-Ward J in *Dikqacwi*, where he remarks:

"[V]igilantes are seen by many in the communities in which the phenomenon of vigilantism and mob justice occurs as upstanding

³² Sykes & Matza (1957) *American Sociological Review* 668.

³³ 669.

³⁴ 669.

and respectable members of the community, and indeed see themselves as serving the interests of their community.”³⁵

Minor ³⁶ proposes an additional neutralisation technique, namely *necessity*. Necessity may come into play if vigilantes ease their conscience by neutralising their violence as a “morally painful but necessary business”, claiming to act as a last resort “with deep sorrow”.³⁷ The idea that breaking the law might be a necessary evil is also endorsed in criminal law. Necessity is a ground of justification whereby a person chooses to break the law, usually by infringing the interests of an innocent third party, in order to avoid suffering some evil. The law recognises that individuals in an emergency situation may be faced with a choice between two inevitable evils, and that it would be against public policy to penalise them for weighing up the evils and consciously choosing the lesser of the two.³⁸ The legal defence of necessity would not avail vigilantes, however. Not only do vigilantes inflict punishment on victims they perceive to be unlawful attackers (rather than innocent third parties as is required by the defence of necessity), but necessity is only a permissible defence where the inevitable evil threatens an interest of greater value than the interest being infringed by warding it off.³⁹ In other words, because vigilantes punish those who have in their eyes committed acts of deviance, not “innocents”, and because the harm caused by such deviance is usually of a less severe nature than the harm inflicted by vigilantes when exacting punishment, they cannot rely on necessity as ground of justification. While vigilante conduct cannot technically be justified as legal necessity, the insight that vigilantes may perceive themselves to be warding off an impending crisis situation with the only feasible option to escape harm being to break the law must nevertheless not be dismissed out of hand.

Now that the various neutralisations have been identified, the legitimisation value of employing techniques of neutralisation needs to be

³⁵ *S v Dikqacwi and others* para 6.

³⁶ W Minor “Techniques of Neutralization: A Reconceptualization and Empirical Examination” (1981) 18 *Journal of Research in Crime and Delinquency* 295.

³⁷ Burrows *Vigilante!* 13.

³⁸ Burchell *Principles* 160.

³⁹ See Snyman *Criminal Law* 119-120.

considered briefly. As regards external legitimation, is the state of mind of a vigilante accused who has employed neutralisations of legal relevance – i.e., may it result in a degree of state legitimation for vigilante violence? Where vigilantes employ one or more of the neutralisations discussed above, it may be argued that, even though no legally-recognised defence is available, vigilantes' criminal responsibility is somehow diminished, and their guilty mind (*mens rea*) is of a less serious degree. If so, it is not unreasonable to maintain that where vigilantes truly perceive their conduct to be necessary intervention aimed at protecting their community from an inevitable wrongful attack where the state is not prepared to offer assistance, their mindset might at the very least be a factor to be considered in mitigation of sentence, due to the reduced blameworthiness of their actions. Reducing vigilante's punishment on this basis would amount to a grudging and indirect legitimation of vigilante violence by the state. The possibility of whether and how the vigilante state of mind may be accommodated by the formal criminal justice system is a topic that is considered at length in chapters 6 and 7.

Even if the argument is rejected that using neutralisation techniques reduces the blameworthiness of vigilante conduct from the perspective of the state, successful neutralisation may nevertheless contribute to vigilantes' internal self-legitimation, in addition to their ability to legitimate themselves in the eyes of their potential supporters. In order for them to convince others of the legitimacy of their appropriation of an aspect of state authority (the power to punish), vigilantes must first sustain a genuine belief in the rightfulness of their own use of power. Eliminating self-blame by using neutralisation techniques to render their own norm violations acceptable to themselves may better empower vigilantes to justify their moral authority to others as well.

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